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WISCONSIN REPORTS
153

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

MARCH 11 — MAY 31, 1913

FREDERIC K. CONOVER
OFFICIAL REPORTER

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES
AAD J. VINJE

Attorney General - - WALTER C. OWEN

Clerk - - - CLARENCE KELLOGG

MEMORANDUM.

Mr. Justice SIEBECKER took no part in the decision of the cases reported in this volume on pages 169 to 271 inclusive.

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CASES DETERMINED

AT THE

January Term, 1913.

HOME INVESTMENT COMPANY, Appellant, vs. EMERSON and another, Respondents.

February 18—March 11, 1913.

Deeds: Tax titles: Quitclaim by owner after judgment foreclosing tax deed: Subsequent setting aside of judgment and discontinuance of action: Collateral attack: Quieting title: Limitation of actions: Statutes construed: "Defendant."

1. A quitclaim deed in this state is equivalent, at least for the purpose of conveying the title of the grantor, to a deed of bargain and sale.
2. A quitclaim deed executed by the original owner of land after entry of a default judgment against him in an action to foreclose a tax deed, operated to convey the full title, where the tax deed was in fact invalid and said judgment was afterwards set aside and the action discontinued.
3. An order in the foreclosure action setting aside the judgment and allowing the defendant to answer and contest the case is not open to collateral attack in a subsequent action to quiet title brought by said defendant's grantee.
4. Although said defendant, the original owner, had conveyed the land before applying to have the foreclosure judgment vacated, he might still, under sec. 2801, Stats., be permitted to answer and defend in that action.
5. Under sec. 4250, Stats., a tax deed was not protected by the statute of limitations where, although more than three years had elapsed from the time of its being recorded, an action for its foreclosure was at issue and pending during the greater part of that time and was afterwards discontinued.
6. Said sec. 4250 relates to any defense which might also serve as a cause of action, hence is applicable in cases of contested title.
7. Although literally said sec. 4250 might appear to be personal to "a defendant," yet, since it is a remedial statute and should be construed liberally, one who was not named as a defendant in an action to foreclose a tax deed, but purchased the land after *lis pendens* filed and was therefore bound by the proceedings "to the same extent and in the same manner as if . . . a party thereto," is entitled to the remedies afforded by the statute.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Albert S. Larson, for the appellant.

J. W. Hicks, for the respondents.

TIMLIN, J. In this suit to quiet title as against one tax deed recorded on June 15, 1900, one recorded on August 15, 1901, one recorded on August 21, 1901, and one recorded on December 19, 1902, all in the register's office of the proper county and all of which are conceded on the argument to have been vulnerable to attack and void unless protected by the statute of limitations, the learned circuit court rendered judgment for the defendant, resting said judgment upon a conclusion of law that the original or patent title to said lands had never been acquired by the plaintiff. This conclusion of law was thought to follow from the following facts, namely: (2) one Samuel L. Prentiss became the owner of the patent title in 1897; (3) June 14, 1900, a tax deed on said land was issued to D. J. Kinne; (4) December 1, 1900, D. J. Kinne commenced an action in the circuit court for the proper county to foreclose said tax deed, and on September 20, 1901, judgment in said action was rendered in favor of said D. J. Kinne, the tax-title holder, and against Samuel L. Prentiss, decreeing that the former was the owner in fee simple of the lands in question and that the latter and his wife and Ashland county and all persons claiming under them, or any or either of them, after the filing of the notice of pendency of the action, were barred and foreclosed of all right, title, interest, and claim in and to the lands in question; (5) on October 11, 1901, Prentiss and wife made and executed a quitclaim deed of said lands to the plaintiff; (6) on December 23, 1901, on the application of Samuel L. Prentiss, the said judgment was set aside and Prentiss and wife permitted to answer; (7) on September 21, 1903, the action mentioned was discontinued by the plaintiff therein; (8) the lands are vacant and unoccupied.

The ruling of the court below was that, because this quitclaim deed was executed after the judgment rendered and before that judgment was vacated, such quitclaim deed conveyed no title to plaintiff, for at that time Samuel L. Prentiss had no title to the land.

A quitclaim deed in this state is equivalent, at least for the purpose of conveying the title of the grantor, to a deed of bargain and sale. Sec. 2207, Stats. The interest which Samuel L. Prentiss had in the land in suit was the full legal title in case the tax deed was invalid, but nothing if the tax deed was valid. After the default judgment was entered against him in the tax-deed foreclosure, this interest continued so long as he had a right to vacate that judgment, answer, and defeat the tax deed or be defeated thereby. After the entry of judgment this interest, it is true, was subject to the further burden of showing good cause in order to entitle him to answer and contest the case. The order allowing him to come in and defend is not subject to collateral attack in this suit and is conclusive that he had such good cause. The evidence, with the concession of respondents' counsel, is conclusive that at that time, before any statute of limitations had barred attack upon the tax deed, this deed was invalid. So we have the case of the owner of the patent title to land clouded by an apparently valid but really invalid outstanding tax deed who conveys the land by quitclaim deed. After he conveyed the land by quitclaim deed he made application to the court to be allowed to appear and answer in the tax-deed foreclosure suit. The court could well have permitted this had the fact of conveyance to the plaintiff been disclosed, for we have a statute providing:

"In case of a transfer of interest or devolution of liability the action may be continued by or against the original party, or the court may direct the person to whom the interest is transferred or upon whom the liability is devolved to be substituted in the action or joined with the original party, as the case requires." Sec. 2801.

No rights which existed to defend against the tax-deed foreclosure would be impaired by this transfer of title, provided application for permission to defend was timely made and for good cause. The judgment rendered upon default in a case where service was obtained by publication left such judgment, by force of statute, subject to the right of the defendant Prentiss to come in upon good cause shown and interpose his answer and defend the action at any time within one year after actual notice thereof and within three years after its rendition. Sec. 2833, Stats. He did this within about three months after the entry of judgment. At the time he executed the quitclaim deed he possessed this right to appear in the action of foreclosure and also an interest in the land contingent upon his defeating the tax deed. He had in law the same interest during the statutory period allowed for attack on this judgment that any holder of the patent title has in the land conveyed by tax deed, except that here he had the additional burden of showing good cause for not appearing sooner in the action. If the tax deed were valid his title was gone. If the tax deed were invalid his title was complete and unimpaired although incumbered by the lien of the unpaid taxes. As we have seen, the tax deed was then invalid, consequently the whole legal and beneficial title passed to the plaintiff grantee in the quitclaim deed.

2. The instant case was begun before any statutes of limitations had barred an attack upon any of the tax deeds unless it be the first one. As to that tax deed, more than three years had elapsed from the date of recording when this suit was begun. But during the greater part of that time the said action for foreclosure was at issue and pending, and, as we have seen, that action was discontinued by the plaintiff, the tax-title claimant. This brings that tax deed within the purview of sec. 4250, Stats., which provides that under such circumstances the time that intervened between the commencement and termination of such action shall not be deemed a

part of the time limited for the commencement of an action by the defendant to recover for the cause of action so interposed as a defense, etc. This statute relates to any defense which might also serve as a cause of action, hence is applicable in cases of contested title. Literally the statute might appear to be personal to a "defendant," and here the plaintiff was not named as a defendant in the so-called tax-deed foreclosure suit, but came in as a purchaser of the land involved in the litigation after *lis pendens* filed. Sec. 3187. It was therefore bound by the proceedings in the tax-deed foreclosure action "to the same extent and in the same manner as if [it] were a party thereto." Id. Sec. 4250, *supra,* is a remedial statute and not to receive a narrow or literal construction. One in the situation of appellant as here disclosed is entitled to the remedies afforded by such a statute. The first tax deed was therefore also not protected from attack by the statute of limitations. The judgment of the circuit court must therefore be reversed.

By the Court.—Judgment reversed, with costs, and the cause remanded with directions to enter judgment for the plaintiff subject to the provisions of sec. 1210*h*, Stats., and for that purpose to take such evidence as may be necessary.

STATE, Plaintiff in error, vs. MCGINLEY, Defendant in error.

February 22—March 11, 1913.

Criminal law: Preliminary examination: Jurisdiction: Review of decision: Keeping house of ill-fame, etc.: Length of time.

1. If, upon the preliminary examination of a person accused of crime, there is competent evidence to give the magistrate any room for the exercise of judgment in determining the existence of the essential facts, his decision to hold the accused for trial is within his jurisdiction and cannot, upon a plea in abatement at the trial, be reversed on the ground that it was not warranted by the evidence.

2. Under sec. 4589, Stats., making it an offense to keep a house of ill-fame or to knowingly let any house or room for such use, the keeping of such house or a letting for such use for any substantial time (in this case two days) is sufficient to constitute the offense.

ERROR to review a judgment of the circuit court for St. Croix county: JAMES O'NEILL, Judge. *Reversed.*

The defendant in error was informed against for keeping a house of ill-fame, also for letting premises for the purpose of being so used. A plea in abatement was interposed, raising the question of whether the evidence on the preliminary examination was sufficient to warrant the decision holding the accused for trial before the circuit court. There was a preliminary examination, regular in form. On such examination there was evidence tending to prove that lewd women, for at least two days, occupied a room in a saloon building owned by the accused and used such room for purposes of prostitution, and that men resorted thereto for and executed such purpose; that the accused had knowledge of the facts and either kept the place and harbored the women for the business for which such room was used, or let the place to them therefor; that he encouraged men to resort to the place and to consort with such women; that he profited by their presence, at least by sale of liquor to them and to men who were attracted thereto by such presence, and that he really helped carry on the business for the women by encouraging or permitting men to resort there.

The court sustained the plea upon the ground that the evidence was not sufficient to make out a *prima facie* case under sec. 4589 of the Statutes.

For the plaintiff in error there was a brief by the *Attorney General* and *N. O. Varnum,* district attorney, and oral argument by *Mr. Varnum* and *Mr. Russell Jackson,* deputy attorney general. To the point that the gist of the offense is the keeping of the house for the purpose of prostitution and

lewdness, and not its reputation, they cited *State v. Lee,* 80 Iowa, 75, 45 N. W. 545; *State v. Smith,* 29 Minn. 193, 12 N. W. 524; 1 Bishop, Crim. Law (1st ed.) § 1038; *State v. Plant,* 67 Vt. 454, 32 Atl. 237; *King v. People,* 83 N. Y. 587; *State v. Hendricks,* 15 Mont. 194, 39 Pac. 93; *Sullivan v. State,* 75 Wis. 650, 44 N. W. 647.

For the defendant in error there was a brief by *E. B. Kinney* and *Spencer Haven,* and oral argument by *Mr. Haven.* They cited, among other cases, *State v. Brunell,* 29 Wis. 435, 436, 438; *State v. Hand,* 7 Iowa, 411, 71 Am. Dec. 453; *State v. Reckards,* 21 Minn. 47; *People v. Gastro,* 75 Mich. 127, 42 N. W. 937, 939; *O'Brien v. People,* 28 Mich. 213; *Comm. v. Lambert,* 12 Allen, 177; *Comm. v. Stahl,* 7 Allen, 303, 304; *State v. Lee,* 80 Iowa, 75, 45 N. W. 545; *Brown v. State,* 49 N. J. Law, 61, 7 Atl. 340; *Comm. v. Bessler,* 97 Ky. 498, 30 S. W. 1012; *Overman v. State,* 88 Ind. 6; *State v. Gill* (Iowa) 129 N. W. 821; *Cadwell v. State,* 17 Conn. 467; *State v. Irvin,* 117 Iowa, 469, 91 N. W. 760.

MARSHALL, J. The judgment must be reversed.

Upon just what ground the trial court condemned the action of the examining magistrate does not clearly appear. If, in deciding that the evidence was insufficient to make out a *prima facie* case, the judge viewed such evidence from the standpoint of a trial court, grievous error was committed. An examination to see whether an accused person shall be placed on trial for an offense charged against him, is a mere inquest. The examining magistrate has very broad latitude in the matter—if the evidence, in any reasonable view of it, satisfies him that a crime within the charge made has been committed and there is reasonable cause to believe the accused is the guilty party he is warranted in holding him to bail. If there is evidence sufficient to give the magistrate any room whatever for the exercise of judgment,—in other words, any jurisdiction to decide the questions of fact within the broad

field of probability, then his decision cannot be reversed in the manner attempted in this instance. *State ex rel. Durner v. Huegin,* 110 Wis. 189, 237, 85 N. W. 1046.

As said in the case cited, when the reviewing court "has discovered that there was competent evidence for the judicial mind of the examining magistrate to act upon in determining the existence of the essential facts, it has reached the limit of its jurisdiction on that point. If the examining magistrate acts without evidence, he exceeds his jurisdiction; but any act, upon evidence worthy of consideration in any aspect, is as well within his jurisdiction when he decides wrong as when he decides right."

In view of the character of the evidence here it must be, as it seems, that the learned circuit judge supposed it was competent, on the plea in abatement, which was practically a motion to quash the information for want of a legitimate basis for it, raising a jurisdictional question,—to review the decision of the examining magistrate on the merits, as in case of a judicial trial. It was not that. It was a mere statutory inquiry. Had the trial court viewed the matter from that standpoint it would readily have seen there was an abundance of evidence to give the examining magistrate jurisdiction to make the decision holding the accused for trial, and that, having jurisdiction to make such decision, there was no ground for the plea in abatement.

It seems possible, from the course of the argument in this court by counsel for defendant in error, that the mere shortness of time covered by the transactions detailed in the evidence may have been thought by the trial court too brief to satisfy the charge of keeping a house of ill-fame. Some authorities on that are cited to our attention. It does not seem necessary or advisable to review them. The law in respect to the matter is too plain to leave room for dignifying the matter of shortness of time, as applied to this case, by a discussion thereof. If a place, such as is mentioned in the statute, for any substantial period of time be kept for the pur-

pose mentioned therein, the offense thereunder is complete. Two days, or a much less time, characterized by the shameful proceedings testified to, would amply satisfy the statutory calls. If one knowingly lets his house, or even a room in a building, owned or controlled by him, for use as a house of ill-fame, he offends against the statute. Time is not, by any means, the essence of the offense. A very brief time as to the actual use or period of letting for the prohibited use, is sufficient. The evidence taken by the examining magistrate was ample to warrant holding the defendant in error for trial, as was done, and the plea in abatement should have been overruled.

By the Court.—The judgment is reversed, and the cause remanded with directions for further proceedings according to law.

STATE BANK OF WEST PULLMAN, Appellant, vs. PEASE, imp., Respondent.

January 8—April 8, 1913.

Limitation of actions: Conflict of laws: Bills and notes: Partial payment by one joint maker: Foreign statutes: Evidence.

1. If the place of a contract is in one country and judicial enforcement of it be sought in another, the statute of limitations of the latter applies, unless the contract right shall have been previously extinguished by the law of the former.
2. The statute of limitations of a country, existing at the time of the making of a contract therein, does not inhere in such contract and go with it, under the rule that the *lex loci contractus* governs as to the nature, validity, and interpretation of a contract unless the mutual intention of the contracting parties at its inception was otherwise.
3. The statute of limitations has reference to the remedy and falls within the principle that the law of the forum governs in respect thereto.
4. So long as a contract has existence under the law of the place thereof, it is enforceable in the forum of any other country unless its limitation laws would afford a defense.

5. In case the limitation laws of the place of a contract bear on the remedy without extinguishing the contract right, it is enforceable in another country where, if such were the place thereof, a remedy would be afforded, otherwise not.
6. In case the limitation laws of the place of a contract bear on the remedy and in time extinguish the right, it is not enforceable in another country, regardless of its own statute of limitation.
7. By force of sec. 4248, Stats. 1911, payment upon a contract by one of two joint makers does not affect the running of the statute of limitations as to the other.
8. In the absence of evidence to the contrary, it is presumed that the written law of another country is the same as our own.
9. The mere introduction of a volume of statutes of another country for the purpose of identification, goes no further than the particular purpose.
10. To make proof of the negative in one country, as to the written law thereof being the same as that of another, by the use of the bound volume of its statutes, it should, at least, be offered in evidence for the specific purpose of showing that it contains no such enactment. The better way would be for the one who has familiarized himself with the matter to testify that the volume does not contain any such law, and in the absence of some such definite evidence, a trial court will not be condemned for deciding a controversy respecting the matter upon the presumption aforesaid.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action to recover on a demand promissory note, dated April 22, 1904, made in Illinois and by its terms made payable there, defendants being joint makers. At such date defendants resided in Illinois. Soon thereafter they removed to Wisconsin. There was a payment by defendant Verne S. Pease within six years after such date and the six years preceding the commencement of this action, which was December 8, 1910. The six-year statute of limitations of this state was pleaded. The ten-year statute of Illinois operating on such contracts was introduced in evidence. The jury found, specially, the facts stated. The court gave judgment for defendant *Edith A. Pease* on her plea of the statutes of limitation, but awarded judgment against Verne S. Pease.

For the appellant there was a brief by *Bentley, Kelley & Hill* and *F. H. Novak,* and oral argument by *F. R. Bentley.*

For the respondent, *Edith A. Pease,* there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

The following opinion was filed January 28, 1913:

MARSHALL, J. If the place of a contract is in one state and an action to enforce it is brought in another, does the statute of limitations of the former apply? Counsel for appellant hold the affirmative. If they are right the judgment is wrong. The trial court held that the law of the forum governs.

Counsel make the mistake of supposing that the statute of limitations of the place of a contract falls within the doctrine that a contract is governed by the *lex loci contractus.* Such is not the case. It bears on the remedy and, in many jurisdictions, including our own, extinguishes the right by rendering it nonenforceable. In a sense, it bears on the right, because a right without a remedy ceases to be a right at all, except in a moral sense. A distinction is made, however, between bearing upon the right and bearing upon the remedy, in this; in case, at the place of the contract, the statute bears on the remedy without operating, fatally, upon the right, such right may be enforced in a state where its own statute has not run; but, in case, at the former place, the right has been extinguished by the law there, then it cannot be enforced in another state even though its own statutory period has not expired. But, in any case, if the contract has not fully run at the place of the contract, but has in the jurisdiction where enforcement is sought, the latter governs. That is by the universal rule, it will be found, when the ground of apparent differences in judicial holdings is appreciated. "This rule is in conformity with the universal rule that, as the statute operates merely upon the remedy, the law of the *forum,* and not the law of the *situs* of the contract, controls." Wood,

Limitations (2d ed.) § 8; *Hite v. Keene,* 149 Wis. 207, 134 N. W. 383, 135 N. W. 354.

In *Arp v. Allis-Chalmers Co.* 130 Wis. 454, 110 N. W. 386, the question was not, as counsel seem to think, whether the limitation act should have the effect, under the circumstances here, accorded to it, but whether it was, strictly speaking, a statute of limitation. Having that in the affirmative, the consequences, in general, of such statutes were held to apply,—apply though the cause of action arose under the laws of another state, the court declaring, as a principle of general application: "It is the long settled doctrine of this court that, when a statute of limitations has completely operated, it extinguishes the right of action by taking away the remedy. . . . In the absence of any saving clause our statutes of limitation operate against nonresident plaintiffs who bring actions in the courts of this state as well as against residents." The court further said, in effect, a right referable to a foreign jurisdiction, may have vitality and be enforceable there and yet have been extinguished as regards the courts of this state, as it is in all cases where, by lapse of time, if the contract were of domestic character, it would be so regarded.

Did the trial court rule right in sustaining the action as to Mr. Pease but not as to *Mrs. Pease?* That was done by reason of our statute, sec. 4248, providing that payment by one joint debtor shall not affect the right of any other to the benefit of the statute of limitations, and the presumption that the law of Illinois—the place of the contract—is the same as here, there being no proof, as the court thought, to the contrary. Counsel, in the main, answer that by claiming that the entire statutes of Illinois were in evidence, showing they contained no such saving clause as our sec. 4248 and that the court should have been governed accordingly,—should not have ignored the presence of the book before it merely because counsel did not definitely call attention thereto or perhaps introduce oral proof on the subject.

The difficulty with counsel's position is that the whole statutes of Illinois were not in evidence except for the purpose of identification; the court being distinctly told that the book was so offered and that only a particular section was required to be considered. That was not changed by anything else which occurred upon the trial. The offer, coupled with a suggestion that no part of the book need be considered except sec. 83, as was the fact, warranted the court in taking that course. Had the volume been offered for the purpose of showing that it did not contain any such provision as our sec. 4248, the case would be far different. On the whole, it seems that the court was rather invited not to look into the limitation statutes of Illinois as a whole, and was warranted, as stated, in applying the statutes of this state, as was done.

Other matters discussed, including a suggestion that our statute was not properly pleaded, and that the law of Illinois fixing the liability of married women had a bearing on the question, have been considered without discovering any reason why the judgment appealed from should be disturbed, or other matters should be treated at length.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, with $25 costs, on April 8, 1913.

CRAWLEY, Appellant, vs. AMERICAN SOCIETY OF EQUITY OF NORTH AMERICA and another, Respondents.

January 9—April 8, 1913.

Societies: Contracts: Debt incurred by local lodge: Liability of national lodge: Organization: Actions: Voluntary association: Liability of members: Parties: Pleading.

1. A national society or lodge is not liable to pay for services rendered (in this case by a state organizer) to a subordinate state union or lodge under an express contract by the latter to pay therefor, in the absence of facts or circumstances raising an implied promise to pay on the part of such national society.

The mere fact that the services ultimately benefited the national society is not sufficient to raise such a promise.

2. In order to organize under ch. 92, Stats., a society must elect trustees as required by sec. 2002, and until it has done so it cannot be sued in the name of the trustees as provided in sec. 2003.
3. An action to enforce a liability incurred by a mere voluntary association must be brought against its individual members.
4. A voluntary association having been sued in its association name and, acting through its board of directors, having answered in that name and litigated the case upon the merits, the action is allowed to proceed to judgment against those who were members of said board of directors when the answer was served. Since the association could not defend, it is presumed that the defense was made for the individual benefit of such directors.
5. It is immaterial in such case that the pleadings were not amended so as to substitute the names of the directors for the name of the association.
6. The liability of members of a voluntary association for the debts thereof incurred during their membership for association purposes being joint and several, those members who thus voluntarily appeared cannot be heard to complain because other members were not made parties defendant.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed as to one defendant; reversed as to the other.*

Action to recover for services. The *American Society of Equity of North America* (hereinafter called *American Society*) is a corporation without capital stock organized under the laws of the state of Indiana. Its objects are, in general, to promote the interests of farmers. The organized forms of the *American Society* are local unions, county unions, state unions, and a national union, or the *American Society,* also department and district unions. The national union is the supreme head of the organization and grants charters to subordinate unions. January 11, 1906, the *Wisconsin State Union of the American Society of Equity* (hereinafter called *Wisconsin State Union*) was organized at Eau Claire, receiving a charter from the national union. Its officers were

and are a president, a vice-president, a secretary, a treasurer, and a board of directors of which the above mentioned officers are *ex officio* members, also one state organizer, and as many local organizers as the board of directors may see fit to commission. At the annual state convention of the *Wisconsin State Union* held in Eau Claire in 1908 the plaintiff, who previously had been a district organizer for the *American Society,* was elected state organizer of the *Wisconsin State Union,* and the board of directors, at a meeting held January 17, 1908, passed a resolution engaging him as state organizer and fixing his compensation. He continued to render services as such state organizer till some time in March, 1909. This action was originally brought against the *American Society* to recover balance of $370.43 claimed to be due him. The *American Society* put in a general denial and alleged that whatever services were performed were rendered for the *Wisconsin State Union,* and not for it, whereupon the *Wisconsin State Union* was made a party. Among other defenses it alleged that it is a society with authority to act and which has acted under secs. 2002 and 2003 of the Statutes and the acts amendatory thereto, and not otherwise, and that the *Wisconsin State Union* is not capable of suing or being sued. The case was referred, and the referee, in addition to the facts above set out, found that the *Wisconsin State Union* is not organized under ch. 92, Stats., which includes secs. 2002 and 2003; that there was a balance of $99.40 due plaintiff, for which he was entitled to judgment. The trial court held that no liability was shown against the *American Society,* and that the *Wisconsin State Union* could not be sued in the name of its organization, and entered judgment dismissing the action as to both defendants. From such judgment the plaintiff appealed.

For the appellant there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

J. R. Mathews and *R. E. Bundy,* for the respondents.

The following opinion was filed January 28, 1913:

VINJE, J. The court properly dismissed the action as to the *American Society.* The plaintiff stood in no contractual relation to it and the services were not rendered under such circumstances as to imply an intention on its part to pay therefor, within the rule of *Wojahn v. Nat. Union Bank,* 144 Wis. 646, 129 N. W. 1068, and kindred cases. The services were not performed at its request, and there is nothing to show that it knew they were being rendered for the *Wisconsin State Union,* except the fact that, out of every initiation fee of one dollar, eighty cents were sent to it, fifty cents of which went to support the official paper of the *Society* and thirty cents to the support of the *Society* itself. It is also true that membership in the *Wisconsin State Union* entitled one to membership in the *American Society.* But plaintiff was hired exclusively by the *Wisconsin State Union* and was paid by it. The fact that his services to it ultimately benefited the *American Society* cannot, under the circumstances of this case, be held to raise an implied promise on its part to pay therefor. It would be a dangerous and unreasonable doctrine to hold national unions or lodges responsible for services rendered to subordinate local unions or lodges on the ground that such services ultimately benefit the national union or lodge. The subordinate union, for the purposes of furthering its own interests, must alone be held liable for services rendered it under an express contract by it to pay therefor, in the absence of facts or circumstances raising an implied promise to pay on the part of the superior union or lodge. Especially must this be so where, as here, the subordinate union alone paid for such services for several years, and the action was for a balance due under the same contract under which services had been rendered to, and payment made by, it.

Was the action also properly dismissed as to the *Wisconsin*

State Union? As we understand it, such dismissal was upon the ground that, since the *Union* was not organized under our statutes, it could not be sued in its society name, or as the *Wisconsin State Union.* It is very evident that the finding of the referee that the *Wisconsin State Union* was not organized under the provisions of our statutes is correct. To organize thereunder it must elect trustees (sec. 2002), and perhaps also file a certified list of such trustees in the office of the secretary of state (sec. 2007). It had done neither, hence it had failed to organize under our statutes. Having failed to do so, it could not be sued in the name of the trustees of (naming the lodge or society), as is provided in sec. 2003. Being neither organized under our statutes nor incorporated, the *Wisconsin State Union* is a mere voluntary association and an action to enforce any liability it may have incurred must be brought against the individual members thereof. 4 Cyc. 312; Niblack, Ben. Soc. p. 181 *et seq.;* Story, Eq. Pl. § 497; *Pipe v. Bateman,* 1 Iowa, 369; *Lloyd v. Loaring,* 6 Ves. Jr. 773. In Niblack, Ben. Soc., p. 183, the rule is thus stated:

"In the absence of statutory regulation permitting an unincorporated society to sue or to be sued in the name by which it is commonly designated, the members must sue or be sued as partners or persons jointly interested. The court will not permit them to sue or to be sued in the character of a society, nor will courts of equity lend their aid to petitioners coming before them in such a character. It is the exclusive prerogative of government to create corporations, and to invest them with power to sue, as such, by their corporate name; and upon principles of policy the courts of the country do not sit to determine upon charters granted by persons who have not the prerogative to grant charters."

The defendant *Wisconsin State Union,* however, did purport to come into court and it answered to, and litigated, the merits. This it could not do as an association. As such it had no standing in court whatever and the court was power-

less to recognize it. When sued in its association name the members thereof or any of them could stay out of court, could appear specially and have the action dismissed for lack of jurisdiction of the members, who alone could be sued, or appear generally and litigate the merits. In this case the governing body of the association chose the latter alternative and litigated the case on the merits. In his opinion the trial judge said: "It is unfortunate that this case cannot be determined on its merits after both parties have been put to the trouble and expense of fully litigating the matters involved in the action." We concur in this statement. Undoubtedly there was a time in the jurisprudence of our state when this court would have also concurred in the final result reached by the trial court. But under the more liberal rules of practice that now obtain, and in view of the tendency to more and more brush aside nonprejudicial technicalities in order that substantial justice may be done at a minimum expense of time and money, it is deemed that, if plaintiff so desires, the action may proceed to judgment against those who were members of the board of directors of the *Wisconsin State Union* at the time its answer was served. As before stated, it must be presumed that the members of the board of directors of the *Wisconsin State Union* authorized the defense in this case. They could not appear in the capacity of the society, but only in their individual capacity. The defense made must therefore be presumed to have been for their individual benefit. They voluntarily appeared and tried the merits. Voluntary appearance in court is equivalent to personal service of summons upon those who appear. Sec. 2643, Stats. The fact that the pleadings were not amended so as to substitute the names of the members of the board of directors for the name of the association is of little moment. They in fact defended, for the association could not. Having defended, it ill becomes them to seek to step out of court when it turns out that their defense is not entirely successful. That the

liability of members of a voluntary association for the debts thereof incurred during their membership and contracted for association purposes is joint and several is sustained by *Vader v. Ballou,* 151 Wis. 577, 139 N. W. 413, and the cases there cited. So the members who are deemed to have voluntarily appeared cannot complain because other members of the association are not made parties defendant.

The powers of this court under sec. 3071, Stats., are very broad and intended to cover every contingency that may arise upon any appeal. Pursuant to such powers the judgment as to the defendant the *American Society of Equity of North America* is affirmed. As to the defendant the *Wisconsin State Union of the American Society of Equity* the judgment is reversed, and the cause remanded with directions to permit the plaintiff within thirty days after the *remittitur* is filed to substitute as defendants herein the individual members of the board of directors of the *Wisconsin State Union* at the time its answer was served, and for further proceedings according to law.

The mandate is made for further proceedings according to law because it appears by the record that the trial court never passed upon the merits of plaintiff's exceptions to the findings of fact of the referee. The trial court should pass upon plaintiff's motion to modify the referee's report and enter judgment against the substituted defendants for such sum, if any, as it may find is due the plaintiff.

By the Court.—Ordered accordingly.

A motion for a rehearing was denied, with $25 costs, on April 8, 1913.

STATE EX REL. SPRITKA, Appellant, vs. PARSONS, County Judge, Respondent.

January 11—April 8, 1913.

Dependent and neglected children: Commitment to state public school: Proceeding before county judge sitting as court: Validity: Constitutional law: Certiorari: *Matters reviewable: Appeal.*

1. Proceedings for the commitment of dependent or neglected children to the state public school, which under sec. 573*f*, Stats., are to be had before the county judge, are valid if had before the county judge sitting as a court.
2. Said statute does not confer judicial powers upon the county judge contrary to sec. 2, art. VII, Const. of Wis.; nor does it violate the provision in amendm. V, Const. of U. S., respecting due process of law.
3. Where commitment proceedings under sec. 573*f*, Stats., are brought to the circuit court for review on writ of *certiorari*, neither an alleged error in denying an application for a continuance nor the weight or credibility of the evidence in support of the findings of the county judge can be considered, neither of such matters being jurisdictional; nor can they be considered upon an appeal to this court from the judgment of the circuit court.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is an appeal from a judgment of the circuit court for Langlade county affirming an order and judgment of the county judge of Langlade county. The case was brought to the circuit court by writ of *certiorari*. The proceeding was commenced under sec. 573*f*, Stats. (1898), as amended by ch. 82, Laws of 1907, pertaining to the commitment of neglected and dependent children to the state public school at Sparta. Upon the hearing on the petition in the county court the county judge made written findings of fact and an order certifying and ordering that such children were neglected and dependent upon the public for support and en-

titled to admission to the state public school at Sparta, and that they be taken to said school by proper authorities and admitted therein. The findings, order, and judgment of the county judge were made in compliance with the statute.

Oscar Rademaker, for the appellant.

For the respondent there was a brief by *Henry Hay;* also a brief by the *Attorney General, Russell Jackson,* deputy attorney general, and *W. W. Gilman,* assistant attorney general; and oral argument by *Mr. Gilman.*

The following opinion was filed January 28, 1913:

KERWIN, J. The questions raised by the assignments of error are (1) whether the county court had jurisdiction; (2) error in denying appellant's motion for postponement of trial and hearing; and (3) that the findings, order, and judgment of the county court as affirmed by the circuit court are neither warranted nor supported by the evidence.

The appellant has favored us with a very exhaustive brief upon the different subjects discussed, but since the points raised have been determined by this court we need not go elsewhere for adjudication. The proceedings taken are under sec. 573*f*, Stats. (1898), as amended by ch. 82, Laws of 1907, which provides that, before any child shall be sent to the school in question, any relative or friend of such child shall present to the county judge of the county within which said child may be an application in writing, signed by the person presenting it, which shall state that the child named therein is dependent upon the public for support or that said child is neglected, and that it shall be the duty of the petitioner to cause the child named to be brought before such judge for examination as to his alleged dependence. The law further provides that the judge shall investigate the facts and ascertain whether the child is dependent, its age, the names and residence of its parents, if living, and that the judge may compel the attendance of witnesses, and may re-

quest the district attorney to attend on such examination, and that it shall be his duty to comply with such request, and that the parents or any friend of the child may appear on its behalf. The law also provides for examination of the child by a physician, and contains other provisions respecting the proceeding.

It is contended under the first assignment of error that the proceeding was before the county court and that it should have been before the county judge under the law. It is true the law provides that the proceeding shall be before the county judge, and it is by no means clear from the record that it was not before the county judge. The record shows that the original petition was addressed to the county judge of Langlade county. The order committing the children does not appear to be made "by the court," but is simply signed by the county judge. The writ of *certiorari* is not addressed to the county court of Langlade county, but to "*John W. Parsons,* County Judge of Langlade County." The petition of the relator for the writ of *certiorari* recites that *John W. Parsons,* a county judge, sitting as a magistrate, rendered the order in question. So the record seems to show that some of the proceedings were before the county judge and were so understood to be by the appellant. On the other hand, some parts of the record would indicate that some of the proceedings were before the county court. But however this may be, we are of the opinion that had the proceedings been before the county judge sitting as a court they would have been valid.

It is settled in this state that the county judge has jurisdiction of such proceedings. *Wis. Ind. School v. Clark Co.* 103 Wis. 651, 79 N. W. 422. This case also settles the question that the granting of such power to the county judge is not unconstitutional. Practically the same points were raised in the *Clark County Case* as by the appellant here and were determined by this court contrary to the appellant's

contention. See *Wis. Ind. School v. Clark Co., supra,* pp. 662–665 inclusive. See also, on this point, 1 Wharton, Crim. Law (11th ed.) ch. XII.

Counsel for appellant also contends that sec. 573*f* of the statute referred to, as amended, violates certain provisions of the constitution respecting due process of law, and that it confers judicial powers upon a county judge contrary to the constitution. On this point we may also add that the questions are not new in this state, but have been determined by this court against the contention of the appellant. *Milwaukee Ind. School v. Milwaukee Co.* 40 Wis. 328; *In re Stittgen,* 110 Wis. 625, 86 N. W. 563; *Wis. Ind. School v. Clark Co.* 103 Wis. 651, 79 N. W. 422; *Guardianship of Klein,* 95 Wis. 246, 70 N. W. 64.

It is further contended that the court erred in denying the appellant's motion for continuance. Under this head quite a lengthy argument is made by counsel for appellant to the effect, as we understand it, that the denial of the motion for continuance was jurisdictional and unconstitutional, on the ground that the appellant was entitled to reasonable notice and an opportunity to be heard, which were denied him. Little need be said upon this subject. Whether error was committed or not in denying the application for continuance cannot be considered here. On *certiorari* the circuit court could only consider jurisdictional matters, and the denial of a postponement does not reach the question of jurisdiction. *Parsons v. Parsons,* 101 Wis. 76, 77 N. W. 147; *Estate of McCormick,* 108 Wis. 234, 84 N. W. 148; *Longstaff v. State,* 120 Wis. 346, 97 N. W. 900; *Milwaukee Ind. School v. Milwaukee Co., supra;* 6 Cyc. 820.

It is also urged as error that the findings and order of the county judge are neither warranted nor supported by the evidence. There is evidence to support the findings made by the county judge. The weight or credibility of this evidence cannot be reviewed on *certiorari.* It is sufficient that the

county judge had jurisdiction to make the findings and order. *Parsons v. Parsons, supra; Longstaff v. State, supra.* It follows that the judgment appealed from must be affirmed.

By the Court.—The judgment is affirmed.

A motion for a rehearing was denied, with $25 costs, on April 8, 1913.

LEMMA, Respondent, vs. SEARLE and another, Appellants.

January 28—April 8, 1913.

Negligence: Gross or ordinary: Destruction of property: Pleading: Findings: Costs: Taxation: Error in trifling amount: Appeal.

1. **A finding that want of ordinary care was the proximate cause of the destruction of property negatives gross negligence or wilful destruction.**
2. **A complaint alleging that "defendants, without the permission, knowledge, or consent of this plaintiff, and without any right or authority, destroyed and burned" plaintiff's wood, does not necessarily charge gross negligence, but will support a judgment for damages caused by ordinary negligence.**
3. **There is no statutory authority for taxing costs for drafting the report of a referee and making copies to keep and serve; but the sum of $6.10, taxed for such items, is too trifling to call for any further relief on appeal than the reduction of the judgment by that amount.**

APPEAL from a judgment of the circuit court for Polk county: FRANK A. ROSS, Circuit Judge. *Modified and affirmed.*

Action for wrongful destruction of plaintiff's property.

Complaint was made to the effect that, in the spring of 1907, plaintiff owned and possessed, on certain lands specified, wood of the value of $600, which defendants, without his permission, set fire to and burned up.

Defendants answered thus: The land on which the wood was located was the property of defendant *Searle.* In 1905,

he licensed plaintiff to place a mill thereon. After operating the mill for some time he removed it, leaving a large amount of wood, sawdust, and rubbish on the land. Thereafter *Searle* employed defendant *Horton* to clean up the premises and fit the same for a farm. In so doing the wood was burned. Long prior thereto plaintiff ceased to have any right to occupy the premises and abandoned the wood as worthless.

Such proceedings were taken that a referee appointed to hear, try, and determine the case made findings to this effect: At the time of the fire plaintiff was occupying the land by permission of *Searle,* the owner. *Horton* in executing the latter's order to clean up the premises did not use reasonable care to avoid burning the wood. Thereby destruction thereof occurred. The wood was reasonably worth $446.80.

On such facts plaintiff was awarded judgment with interest from the time of the destruction of the wood.

The court found, further, that negligence of defendant *Horton,* acting under direction of defendant *Searle,* was the proximate cause of plaintiff's loss without any want of ordinary care on his part contributing thereto.

Judgment was rendered accordingly.

For the appellants the cause was submitted on the brief of *Morris E. Yager,* attorney, and *Holland & Lovett,* of counsel.

Frank B. Dorothy, for the respondent.

The following opinion was filed February 18, 1913:

MARSHALL, J. The questions presented for consideration do not merit more than brief treatment—some hardly to be mentioned.

Some errors assigned go to the question of whether the findings of fact were warranted. It is sufficient to say in respect thereto that we are unable to see any good ground for holding any thereof to be contrary to the clear preponderance of the evidence.

The point is made that the court erred in refusing to find the wood to have been wilfully burned. The finding that want of ordinary care was the proximate cause of the destruction, necessarily, negatives gross negligence.

The further point is made that the complaint was for gross negligence,—intentional destruction,—and that, without amendment, it would not support a judgment for damages caused by ordinary negligence. There seem to be several answers to that, rendering the authorities upon which counsel rely inapplicable. The charge in the complaint is very general. The pleader's language is: "defendants, without the permission, knowledge, or consent of this plaintiff, and without any right or authority, destroyed and burned" plaintiff's wood. That is quite ambiguous. It covers the circumstances of burning through ordinary negligence, burning through gross negligence, and intentional burning. There was no motion to make more definite and certain nor any motion for plaintiff to elect as to the theory of his case. In that situation the court below was right in reading out of the pleading any theory which the evidence would support entitling plaintiff to relief.

Complaint is made because the court approved of the taxing of $6.10 for drafting the report of the referee and making copies to keep and serve. There is no statutory authority for taxing such items, but the amount is too trifling to call for any further relief than a modification of the judgment.

By the Court.—The judgment appealed from is modified by reducing it to the extent of $6.10, and as modified affirmed with full costs in this court.

VINJE, J., took no part.

A motion for a rehearing was denied, with $25 costs, on April 8, 1913.

WILL OF BALL: BALL, Appellant, vs. BOSTON and others, Respondents.

February 19—April 8, 1913.

Wills: Validity: Undue influence: Findings of trial court: Weight on appeal: Degree of proof: Burden of proof: Fraud.

1. Every person of mature years and sound mind has an inherent right to make a will, which neither the court can abridge nor the legislature take away.
2. Regardless of the testamentary wish as to beneficiaries, if it be expressed lawfully, there is no right in law nor duty in equity other than to enforce it.
3. The testamentary, is as ample as the contracting, power, and courts should uphold exercise of the former as firmly as the latter, regardless of the wishes of disappointed relatives.
4. The charge that a will, good in form, and made by a person having testamentary capacity, is the will of another, produced by that other's undue influence, sounds in fraud.
5. In case of an inquiry as to whether a will, good in form, is void for undue influence, the rule applies that he who charges fraud, to prevail, must support his claim by clear and satisfactory evidence.
6. The rule that a trial judge's findings of fact are due to prevail unless contrary to the clear preponderance of the evidence, has weight according to circumstances. Its ordinary efficiency is lessened where findings rest on inferences from conceded or established facts, and reduced to a minimum or displaced where the conclusions are reached by mistaken ideas of law.
7. A finding of fact without due heed for the rule respecting its establishment, has little or no support in the presumption of correctness which requires a clear preponderance of evidence to displace it.
8. The distinction between clear and satisfactory evidence and mere preponderance of evidence, is substantial, and may properly be the turning force in balancing conflicting inferences.
9. In an inquiry as to whether a will is the product of undue influence, the same as others sounding in fraud, the *onus probandi*, from first to last, is on the one charging the wrong, requiring clear and satisfactory evidence to satisfy it.
10. The rule that,—in case of opportunity for the exercise of undue influence being clearly shown, a subject unquestionably susceptible thereto, and clear indications, by direct or circumstan-

tial evidence, of exercise thereof, the person to be benefited by the wrong is called upon to rebut the presumption against him by showing good faith,—does not involve any shifting of the burden of proof.

11. In case of its appearing, *prima facie*, that preference by will was secured by undue influence, and defendant so weakens such showing that the essential evidentiary circumstances no longer rest on clear and satisfactory evidence, such showing will not warrant a recovery.

12. A testamentary preference secured by undue influence contemplates existence of a wrongdoer and perpetration by him of a fraud upon an unwilling or unsuspecting victim; rendered substantially powerless by "insidious approaches, seductive artifices, or other species of circumvention," disabling such other from acting of his own volition.

13. Undue influence is the antithesis of right influence. One may, in some circumstances, rightfully influence and persuade another to provide by will in his or her favor, especially in case of a wife or near relative, so long as the testator, in the end, acts upon his own judgment.

14. Opportunity to exert undue influence spoken of among essentials of a *prima facie* circumstantial showing of the procurement of a will by undue influence, is not satisfied by the ordinary and natural seclusion and association in the domestic relations of husband and wife.

15. Neither the natural attentions of a wife to her invalid husband, nor her helpful efforts in caring for his business and property, nor efforts, at his request, to aid him in efficiently expressing his dying wishes as regards his property, are badges of fraud.

16. The natural characteristics of secrecy in making a will, either as to the fact of making or the contents of the paper, do not answer to that secrecy sometimes legitimately referred to as circumstantially bearing on the question of undue influence.

17. The *onus probandi* being on the person charging procurement of a will by undue influence, incidents in the lives of an alleged victim and wrongdoer being shown to circumstantially establish the charge, which might be regarded condemnatory or innocent according to circumstances, the latter should be taken as the true aspect in the absence of satisfactory indication to the contrary.

18. Setting aside that which purports to be a man's final testamentary wishes, is of such serious nature that, in case of an alleged wrongdoer being so near to the testator as that of a wife, especial care should be exercised to avoid possibility of defeating the dying hope to have provided for his surviving

spouse. No mere suspicious circumstances should have weight nor inference of wrong be raised from the natural incidents of the relations of husband and wife.

[Syllabus by MARSHALL, J.]

WINSLOW, C. J., and BARNES, J., dissent.

APPEAL from a judgment of the circuit court for Oneida county: A. H. REID, Circuit Judge. *Reversed.*

Action involving the validity of a will.

In due proceeding in the county court of Oneida county for the establishment of an instrument proposed as the last will and testament of William Francis Ball to be such will in fact, the petition therefor was denied. An appeal from such decision was taken to the circuit court for such county, resulting in an affirmance thereof, based on findings to this effect:

1. September 24, 1911, Mr. Ball died, aged seventy years and past.

2. His wife survived, also a daughter, *Ida Boston,* and two sons, *Roy* and *Charles,* all being adults.

3. August 28, 1911, in his last sickness Mr. Ball made a will, good in form, giving all his property to his wife.

4. He had a livery business which he had conducted for some twenty years, was worth about $6,500, and owed about $2,000, secured on his real estate.

5. He first married Sarah Brown, who became the mother of the three children, the contestants herein, lived happily with his family until she died in 1905, and during that time, accumulated substantially all his property.

6. He was uniformly kind to his children until he remarried; received from *Roy,* some nine years theretofore, $600 in notes, and from *Charles* $400 in money, with the understanding that he should have an interest in the business; allowed the claims in favor of his sons to outlaw but employed *Roy* in his later years to help run the business and left him in charge when he last visited the stable.

7. Soon after Sarah died, he employed *Delia Orinda Mc-*

Kelvery as housekeeper and kept her some two years, when he sold his home and broke up housekeeping. She had been twice married, was of strong mind, about fifty years of age, and acquired a strong influence over him while she was his housekeeper, he coming to rely and feel dependent upon her and resort to her house to be nursed in his sickness.

8. Mr. Ball was afflicted for twenty years with a progressive habit of indulging in intoxicants; resulting in his health being impaired and cirrhosis of the liver developing, which, complicated with stomach trouble and an open fistula, ended his life.

9. June 6, 1910, Mr. Ball married his previous housekeeper, went to live at her house some distance in the city away from his children and old friends, grew more and more estranged from the former, accepted active interest and advice of his wife in his business, ceased to consult with the children, and tried to change a policy of life insurance which ran to his first wife and her heirs so as to run to his second wife. She purposely promoted his unnatural treatment of his sons by putting a two-year-old laundry bill she had against one of them, without first demanding pay, in the hands of a lawyer with instructions to sue, causing *Roy* to be arrested and jailed on the charge of disorderly conduct, and taking control of the business from him and putting another person in his place.

10. In general, after the second marriage, Mr. Ball was in such poor health as to weaken his mental faculties and render him more and more dependent upon his wife with whom he lived alone, seldom communicating with his children.

11. Two days before making the will, he took to his bed in his last sickness and, thereupon, his wife increased her activity in looking after his business, secured her attorney, who was unknown to him, to draw his will and chose a friend of hers to witness it, kept the making thereof a secret, refused to allow his sons to see him alone until after the will was

drawn, and had full opportunity to prejudice him against his children.

12. *Mrs. Ball* had opportunity, ability, and disposition to unduly control the will of her husband in her own favor,—resulting in his making his will under her suggestion and expressing her desire rather than his voluntary purpose.

Upon such findings the conclusion was reached that the decision appealed from was right. Judgment was therefore ordered and rendered affirming the same with an allowance of $25 attorney's fees to the successful party, but without costs for or against the proponent.

For the appellant there was a brief by *Chas. F. Smith, Jr.*, and *John Van Hecke,* and oral argument by *Mr. Van Hecke.*

For the respondents the cause was submitted on the brief of *Miller & Reevs.*

MARSHALL, J. As often, and not too often, said, the testamentary right is one of the most important of the inherent incidents of human existence. It has been so regarded since the dawn of civilization. As an eminent text-writer put the matter, "It has been held sacred by all nations and under all conditions;" and, we may add, it has in no time or place or condition been more significantly upheld than during the period of development in the countries blessed with, and characterized by civic growth, promoted by, principles of the common law. It is not a mere privilege which legislatures can directly or unreasonably regulate to destroy. It is not an incident of the possession of property which courts can deal with in any spirit of mere discretion. It is a right, absolute, which every person of mature mind and disposing memory may exercise, subject to some regulations to prevent abuse of it and to safeguard it, as he sees fit. Filial expectancy of profiting by inheritance, is proper. Reasonable indulgence in it is natural and judicial conservation of the free exercise of volition to satisfy it, is demanded; but, in a very high de-

gree, the testamentary right, as compared with that of the mere subjects of testamentary charity or bounty, is the superior. As said for the court in *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939, "The highest equity which courts can consider is the right of an individual to dispose of his property as he chooses. The hope of inheritance, which any child may indulge in during a parent's life, bears no comparison in the eyes of the law to the right of disposal by the parent." If one testamentarily gives his property in a particular lawful way, "there is no duty of equity or conscience to thwart that will."

The foregoing observations are deemed proper as pointing, in general, the attitude with which trial courts, and all courts, should consider a question presented as to whether a will, made with all the formalities prescribed by law to safeguard and evidence the free exercise of the testamentary right, especially where testamentary capacity is either not disputed or not successfully impeached, shall be judicially enforced as the real wish of the testator or suppressed as a fraudulent production; a creation of the volition of another, wrongly imposed upon the testator so as to give it the cast of the latter's considerate effort. It is not infrequent that there is evidence in a trial record that the particular situation dealt with was measured with rather an exaggerated idea of the rights of disappointed relatives, partially or wholly eclipsing the real right to be protected above all. *Vance v. Davis, supra; Will of Rice,* 150 Wis. 401, 136 N. W. 956, 137 N. W. 778; *Loennecker's Will,* 112 Wis. 461, 88 N. W. 215; *In re Butler's Will,* 110 Wis. 70, 85 N. W. 678; *Will of Dardis,* 135 Wis. 457, 115 N. W. 332.

The sole question in a will contest is, Does the purported will legally express the testator's dying wish? His right, not that of any survivor, is the dominant thing. The will may be very unlike what it would seem, from a moral standpoint, it ought to be, yet if it lawfully expresses the testator's dying

wish, that ends the subject,—there is no power in equity to change it or set it aside,—the judicial power exists only to execute it. *Vance v. Davis, supra; Will of Rice, supra.* As remarked by RYAN, C. J., in *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103:

"Breaking a will is very much like making one," imposing on the testator a rule for the distribution of his estate "against his solemn wish in dying." "Every one should have power to dispose by will, after his death, in accordance with his own wishes, of whatever he may leave behind him in his own sole right, as he had in life to dispose of it by contract or gift. And it is as much the duty of courts to uphold his will after death, as to uphold and enforce his contracts made during life."

It is not intended by the foregoing observations to suggest that there was any want of familiarity by the learned trial court in disposing of this case with the salutary principle expressed and so often illustrated in the opinions of this and other courts; or that there was any purpose to unmake the will of Mr. Ball and remake it along the lines of a statutory distribution,—thought to be more considerate, under the circumstances, of the moral claims of his children. The effect of the logic which led to the result complained of is the paramount question.

There are many evidentiary conclusions leading to the vital matter of fact in issue. It is contended by appellant that such evidentiary circumstances are, in some cases, without any evidence to support them, in others, contrary to the clear preponderance of the evidence, and, in others, in conflict with direct and circumstantial proof showing the contrary, and, that, in any event, the final inference of fact is wholly unwarranted. That is a severe arraignment of the findings and calls for pretty close examination of the record.

Before taking up, in detail, the numerous complaints as to the findings, it seems best to advert to some well settled principles of law applicable thereto.

In general, findings of fact made by a trial court are disturbable with much difficulty, for reasons often stated. Those reasons have less and less force till they cease to apply at all, according to circumstances. They have no force at all in case of the result having been reached by misconception of the law. *Maldaner v. Smith,* 102 Wis. 30, 78 N. W. 140; *Kelley v. Crawford,* 112 Wis. 368, 88 N. W. 296; *Harrigan v. Gilchrist,* 121 Wis. 127, 312, 99 N. W. 909.

It must be appreciated that the alleged wrong sounds in fraud. *Small v. Champeny,* 102 Wis. 61, 68, 78 N. W. 407; *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939; *Loennecker's Will,* 112 Wis. 461, 88 N. W. 215; *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220; *Gordon v. Burris,* 153 Mo. 223, 54 S. W. 546; *Grove v. Spiker,* 72 Md. 300, 20 Atl. 144; *Mackall v. Mackall,* 135 U. S. 167, 10 Sup. Ct. 705. Terms of apparently double meaning will be found used in respect to the subject, such as "fraud and undue influence;" "fraud or undue influence," in connection with suggestions that the terms "fraud" and "undue influence" are not technically synonymous, though if there be any difference it is, probably, that between actual and constructive fraud.

In *Will of Slinger,* 72 Wis. 22, 37 N. W. 236, the late chief justice, speaking for the court, said: "Manifestly, it is a subtle species of fraud, whereby mastery is obtained over the mind of the victim by insidious approaches, seductive artifices, or other species of circumvention." Note the judicial conception of the essentials of the wrong found in this case, "insidious approaches, seductive artifices, or other species of circumvention." We could not put too much emphasis thereon to contrast therewith those perfectly legitimate influences between husband and wife, which will be later referred to and, in the light of which, the real facts of this case must be viewed.

In *Gordon v. Burris, supra,* the court remarked, without qualification, that undue influence is a fraud, and in *Grove v.*

Spiker, supra, that it is closely allied to actual fraud. It is, really, one of the most reprehensible of deceits because of the cunning, insidiousness, and artifices of seduction, which, in general, characterize it and by means of which the unsuspecting victim is rendered powerless to carry out his own wishes or resist those of the wrongdoer.

Thus it will be seen that, in a case of this sort, if there is failure to appreciate that the gist of the attack upon the will is fraud, and the rule applies that, he who alleges fraud must establish it,—not by a mere preponderance of, but by clear and satisfactory, evidence,—the finding as to the vital fact is liable to fall within the rule before stated as to want of dignity because of having been reached without proper legal guidance.

The rule of clear and satisfactory evidence in fraud cases, as distinguished from mere preponderance of the evidence, is substantial and may, very properly, be the turning point, especially, when the matter rests in mere inference. As has been frequently said, while in ordinary civil matters the person on whom the burden of proof rests may rely upon evidence establishing the facts to a reasonable certainty, though the evidence be not, in all respects, clear and satisfactory, not so where fraud is the gist of the matter, then he must go further,—not to the extent of establishing the charge with the highest degree of certainty, but to that one which rests, not only in reasonable certainty, but on evidence which is clear and satisfactory. Though the difference may appear somewhat shadowy it exists and forms a substantial basis for a rule firmly intrenched in our jurisprudence. *Lepley v. Andersen,* 142 Wis. 668, 671, 125 N. W. 443; *Harrigan v. Gilchrist,* 121 Wis. 127, 313, 99 N. W. 909. Its logic rests in a presumption against wrong akin to that of innocence in a criminal case. Whether the salutary rule was not lost sight of in this case, challenges attention for reasons which will appear as we proceed.

We note the statement in the learned circuit judge's opinion that, the contestants having established a *prima facie* case of undue influence, the burden was upon the proponent to show that the will was the testator's own voluntary act. That is somewhat ambiguous, in view of the expressions found in *Davis v. Dean,* 66 Wis. 100, 26 N. W. 737; *Disch v. Timm,* 101 Wis. 179, 77 N. W. 196, and some other cases, from which it might be inferred, perhaps not without warrant, that in this class of cases, the burden of proof is on the person charged with fraud to prove affirmatively that there was no such wrong upon a *prima facie* case being circumstantially made against him; that then the burden of proof shifts and remains with the defendant. Those expressions were somewhat emphasized by the statement in *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939, that, "in apparent contradiction of the ordinary rule requiring clear and direct proof of fraud, this and other courts have recognized the necessity of casting the burden of negative proof upon one who profits from a position of confidence and control by a conveyance of such character and made under such circumstances as to suggest improbability that it is the free act of the grantor, and probability that it is due to influence of the beneficiary." All such expressions, understood with reference to the premises upon which they are based, and the particular facts dealt with, are free from serious, if not from any, infirmity, yet they have misled, sometimes, as the records here bear evidence.

Whatever of misleading character there is in the expressions referred to, was intended to be eliminated from our jurisprudence in the treatment of the subject by the present chief justice, speaking for the court, in *Winn v. Itzel,* 125 Wis. 19, 32, 103 N. W. 220, thiswise:

"We do not understand that the principle there approved changed the practice in fraud cases, or affected the order of the trial of such cases. Parties who charge fraud must prove fraud after as well as before that decision,"—referring par-

ticularly to *Vance v. Davis*. "They still have the burden of proof. It was simply held in that line of cases that when a plaintiff, charging fraud, had proven certain facts, he had made a *prima facie* case, though he might not have produced any direct evidence of fraudulent acts or words. . . . When the plaintiff makes a *prima facie* case, entitling him to relief if the proof stops there, the defendant must take up the burden and meet the case so made by other evidence. This is the case in all contests of fact. It is not peculiar to fraud cases. The rule of *Davis v. Dean* did not deny the long established rule nor did it tend to do so. It simply announced what facts would be considered as *prima facie* proof of fraud, requiring explanation by the defendant."

Thus it will be seen, in a case of this sort, upon a *prima facie* case being circumstantially made calling upon the person charged with fraud to explain his conduct, there still stands the presumption against wrong doing, eclipsed for the time being by the adversary presumption, but, subject to be efficiently aroused by affirmative evidence, direct or circumstantial, so satisfactorily explaining the adversary circumstances that they no longer seem to exist by clear and satisfactory evidence. In the end, upon the whole case, the circumstances from which the alleged undue influence is inferable as matter of law must stand upon such evidence. That is, the burden being upon the one charging undue influence, from first to last, to establish it by clear and satisfactory evidence, the rule goes to the existence of the circumstances; the effect of the circumstances is matter of law. Weaken the case as to any one of the vital major incidents so that it can no longer be said to exist by clear and satisfactory evidence; then the *prima facie* case once created is so far rebutted that the plaintiff cannot successfully stand thereon, but must go further.

A brief treatment of what constitutes undue influence and what circumstances are essential, where such evidence, alone, is relied upon by the person charging fraud, will aid in test-

ing the question of whether the findings here, as to mere evidentiary incidents, has a sound basis in the evidence, as well as whether they establish, with the requisite degree of certainty, even *prima facie,* the major circumstance, essential to support the legal presumption of wrong doing.

The general characteristics of undue influence are strikingly presented in *Will of Slinger,* before adverted to. The actor is treated as a wrongdoer,—one bent upon a reprehensible purpose; the other as his unwilling or unsuspecting, in any event under the circumstances, powerless victim of the purpose effected by "that subtle species of fraud,"—where such helplessness to resist direct or indirect suggestion is produced by "insidious approaches, seductive artifices, or other species of circumvention." Undue influence is the very antithesis of right influence. It exists only where there is practical destruction of voluntary volition,—at least, is moral coercion for an ulterior purpose. *Anderson v. Laugen,* 122 Wis. 57, 99 N. W. 437. This species of wrongful influence should never be confused with influence through affection or disposition to favor a member of one's family produced by legitimate feelings of esteem or gratitude.

One may be very strongly influenced by a wife, or other person standing in close relation to him, to prefer such person in the final disposition of his property. He may even be strongly importuned, his judgment appealed to and reason convinced by argument to a desired end, if there is no wrong influence, so long as he finally, by his own volition, carries his purpose thus arrived at into effect. *In re Will of Jackman,* 26 Wis. 104; *Deck v. Deck,* 106 Wis. 470, 82 N. W. 293; *Mueller v. Pew,* 127 Wis. 288, 106 N. W. 840; *Appeal of Turner,* 72 Conn. 305, 44 Atl. 310.

The language of this court in the *Jackman Will Case* has been, in terms, or effect, reiterated here in numerous decisions and cited, time and time again, with approval elsewhere. The

influence of a wife or child, if exerted in a fair and reasonable manner, is not unlawful, and in order to be undue "it must be exerted *mala fide*, to produce a result which the party, as a reasonable person, was bound to know was unreasonable and unjust." "As neither courts nor parties can make wills for men they ought to be careful in unmaking them." The influence denounced by the law must be something more than "the influence of affection or attachment" or design of gratifying the wishes of one beloved, respected, and trusted by the testator." *Jackson v. Hardin,* 83 Mo. 175, 185. "Mere solicitation will not be sufficient to vitiate a will made by a person having a knowledge of what he is doing, and intending to do it, though his act may be brought about by solicitation, or that kind of influence which a disposition to gratify another may produce." *Sutton v. Sutton,* 5 Harr. (Del.) 459, 461. Mere kindness of treatment and proper attention which stimulates the desire to reward from an intelligent sense of duty are legitimate. *Appeal of Turner,* 72 Conn. 305, 44 Atl. 310; *Barlow v. Waters* (Ky.) 28 S. W. 785, 786; *Nelson's Will,* 39 Minn. 204, 39 N. W. 143.

Thus this court, and most courts, have spoken, to guard against wishes of disappointed relatives improperly disturbing the testamentary right, either because of a judicial failure to differentiate between undue influence and due influence, or to appreciate that the instrumentality for avoiding wills upon the ground of undue influence is, primarily, to conserve the rights of the testator, not those who would profit from his estate by displacing his will. The danger of so far dignifying the incidental as to endanger the primary right, magnify suspicion into proof, and impair the capacity of a person to reward a wife or other relative for that care in the helplessness of old age, sometimes accompanied with such infirmities as to require attention beyond the power of mere money to obtain, was adverted to in *Vance v. Davis,* 118 Wis.

548, 95 N. W. 939, and particularly in *Mackall v. Mackall,* 135 U. S. 167, 172, 10 Sup. Ct. 705, the court speaking thus:

"Influence gained by kindness and affection will not be regarded as undue if no imposition or fraud be practiced, even though it induced the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and administered to his wants, if such disposition is voluntarily made."

"It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it would deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them."

The foregoing, as to the nature of undue influence, raises the question, logically, as to the essential circumstances for its establishment, where there is no direct evidence. That has been frequently, in terms or effect, answered. There must be a subject "unquestionably susceptible to undue influence," a disposition to undue influence for the purpose of procuring the improper favor, opportunity to exert that influence and effect the wrongful purpose, and it must be exerted so as to deprive the victim of free agency "and constrain him to do not only what is against his will, but what he is unable to refuse or too weak to resist." That, in the *Jackman Will Case* (26 Wis. 104), has been, in effect, repeated many times. The law does not lay hold of and render the first three elements, *prima facie,* clear and satisfactory evidence of the accomplishment in advance of their being established with that degree of certainty. They cannot rest upon mere preponderance of the evidence or suspicion. This feature is important in anything like a close case. The trial judge here reached the conclusion that such three elements existed. In that he proceeded by logical steps to the ultimate fact. Whether he appreciated the essential of certainty referred to does not appear from anything said in the opinion, and if we should conclude he did not from the findings themselves, as before indicated, they should be shorn of the pre-

sumption in their favor. That the stated degree of certainty is necessary, follows from the very nature of the case and has been expressly recognized in the authorities before cited, and significantly in *Fox v. Martin,* 104 Wis. 581, 80 N. W. 921; *Loennecker's Will,* 112 Wis. 461, 88 N. W. 215. The rule is stated in the latter case as practically the logic of the former, that there must be shown a subject "unquestionably susceptible to undue influence . . . also some clear evidence of opportunity and a disposition on the part of the beneficiary to exercise such influence." That is repeated in *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939; *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220, and other cases, all to the general effect that the presumption against wrong is too probative to be overcome by anything short of clearly established circumstances clearly inconsistent therewith.

In the foregoing legal environment of this case we will proceed to examine the numerous complaints of the findings of fact.

The general effect of the exceptions is that the trial court viewed the case with suspicion from the mere fact that Mr. Ball, an old infirm man with three adult children, which he had ordinary regard for, took a second wife, lived with her a little more than a year in practical seclusion from his children, then deceased; having in his last sickness and about a month before the end left her by will all his property. The idea is that proponent's case having been thus wrongfully regarded, many little actual or supposed incidents were woven together to confirm such suspicion, some of such incidents having no support in the evidence and some found from the most unfavorable inferences the evidence would reasonably bear, resulting in many ordinary occurrences being given the cast of "insidious approaches, seductive artifices, or other species of circumvention," and proponent being convicted of having subverted Mr. Ball's mind and destroyed his capacity to exercise his own volition in disposing of his estate,—contrary to direct evidence that he made his will while in full possession

of his faculties; that proponent neither gave direction nor made a suggestion in respect to it, and that he acted in her absence from his presence and without her knowledge respecting what was embodied in the testament. If this broad general claim is borne out by the record, obviously, the legal principles to which we have adverted were not given their appropriate force.

In view of the general scope of the complaints made by counsel for appellant, it seems best to state here the general character of Mr. Ball's life and his surroundings at the time of making the will, particularly the size of his estate and the legal and moral claims which, in the natural course of things, one circumstanced as he was would be likely to recognize.

Mr. Ball lived with his first wife happily, it would seem, from the time he was a young man until he was about sixty-five years of age. She bore him three children, two boys and one girl, and all lived at home until of age and two had secured homes for themselves. The daughter married before her mother died and became well located with a prosperous business man as her husband in a city some distance from her father's home. The oldest son was some thirty-eight years of age when the will was made. He was without family and had lived apart from his father for some years though assisting him, for pay, in running the stable. He was accustomed to using intoxicants, but was in good health and abundantly able to take care of himself. The youngest son, at the end, was about twenty-seven years old. He lived with his father some three years after the mother died, then married and established a home of his own, in which he resided with his wife and child. He was possessed of an income of $1,800 per year. All were independent of the father. No one of them was so situated as to be able, conveniently, to make a home for him in his old age. He had no reasonable expectation of that care from his children which he required on account of his age and infirmities. He had always been domestic in habits

and kindly disposed towards his family, especially his wife. He was that solicitous for the first one, with whom he lived thirty-five years more or less, that he early took out and kept up a policy of life insurance of $1,000 for her sole benefit, as he evidently supposed. About a year after her death he employed *Mrs. McKelvery,* a woman about fifty years of age, an industrious rather strong character, as housekeeper, so as to preserve his home life. After his youngest son made a home for himself, Mr. Ball sold his place and boarded and roomed alone. About a year thereafter he married *Mrs. McKelvery.* Such mutual regard existed between them and had been fostered by her serving him faithfully for some two years as housekeeper and later nursing him in sickness, as might reasonably be expected in case of a man of his years, kindly disposed and of domestic habits, and a woman of her years and station, associating together as they had much of the time, the old gentleman needing the assistance in his business and the care which the strong woman was able to render, and she being willing to afford such assistance and care in consideration of companionship and such reasonable expectation of being provided for in the final disposition of his property as a man of his disposition would be likely to gratify. She made a home for him and served him faithfully as a wife to the day of his death, bestowing upon him, to the limit of her ability, all the care which she was capable of, and making his life as comfortable as she could. He endeavored to transfer to her his life insurance policy, but was unable to do so. At the last, he saw no way of providing for her except by will. No one of his children stood in need of his assistance. The thousand dollar insurance policy, which he regarded as his property, he found to be legally that of his children. He had, as he thought, when reduced to money and all claims and expenses paid, very little. There was real estate and personal property, estimated to be worth about $6,500, but his indebtedness was so large—being some $3,500—as to render neces-

sary conversion of his estate into money in settling the same. The outlook was such that, after paying the indebtedness, expenses of administration and, in case of intestacy, providing for the statutory allowances to his wife, there would not be much to divide,—no more than enough to afford each of the children a few hundred dollars. Under those circumstances, with full testamentary capacity, separate and apart from his wife, he made the will which he may well have thought would not yield her for support, facing an expectancy of life of some eighteen years, and for past and future care of him, more than $1,500 or so in ready-money value.

True, the findings are to the effect that the net estate was of the value of $4,500, but that seems clearly contrary to the evidence to the extent of more than $1,500, as we shall see, even if the estate were of the ready-money value of the full inventory—which is not very likely,—leaving out of view expenses of administration and statutory allowances to the widow. Counting those matters, the probable result of intestacy and the probable result of attempting to turn such property as Mr. Ball had into money, as he must have viewed the matter when he made the will, the court placed the net estate rather more than twice the real value.

At this point a serious infirmity appears in the trial disposition of the case in the judge's opinion,—much more so in the findings. It is significant that the expenses of administration and the rights of the wife as to statutory allowances and the unsecured debts were wholly overlooked, especially in the findings. That might have had a very material bearing on the final result. In the opinion the net estate was placed at $3,500, while, as before indicated, the figures were raised to $4,500 in the findings, wholly overlooking the unsecured debts and other matters which would necessarily require the equity in the real estate to be sold in order to obtain money for their discharge. To say that Mr. Ball could have thought the effect of his will would be to net his wife $4,500, or half that sum or

much more than $1,000 in excess of what she would be entitled to in a statutory distribution and settlement, does not seem to be borne out by a fair appreciation of the situation disclosed by the evidence.

In view of the general situation as above pictured, the theory of the decision that Mr. Ball made an unnatural disposition of his property must be unsound, unless there be sufficient in the detail circumstances of *Mrs. Ball's* conduct towards her husband and his conduct under her influence, to radically change the aspect of things. Without such efficient details, it looks as if he did about what a man seventy years of age,—of domestic habits, who had enjoyed a good home for about thirty-five years or so and been bereft of such for several years and, having a few more years in expectancy during which he would stand in great need of wifely care, and a small amount of property and taken for a companion a woman in honorable widowhood, strong in body and mind, of suitable age for the wifely duties he needed,—might be expected to do, if such, knowing his habits, his infirmities, and his fortune, would be willing to enter into such a marriage contract. It is perfectly natural and by no means improper that such a union should take place, promoted only by mutual regard and expectation of the stronger party being remembered, pecuniarily, in the end, and without any element of that personal nature characteristic of the flower of life. If Mr. Ball thought to reward his wife as well as he reasonably could for her services to him, and she thought to acquire and earn such pecuniary reward as her husband, under the circumstances, might be willing to bestow upon her when near the end and able to fairly measure the value of the consideration rendered by her, all was natural and proper. It would be a most lamentable state of things if, in responding to an appeal, in form, for protection of the testamentary right, the disappointed hopes of relatives, under such circumstances as we have here, should have such weight as to defeat the plan of an

old man, situated as Mr. Ball was, of providing for the care needed in the last years of his life.

So the feature of the decision, which evidently had great weight with the trial judge, found in this language:

"Her marriage to the deceased when he was nearly seventy years old, broken in health and burdened by age and his bad habit of alcoholism, was either very self-sacrificing on her part or the result of a design to financially profit by the marriage,"

was not entitled to such regard. The idea seems to be that, for a woman circumstanced as the one in question was to marry a man circumstanced like Mr. Ball, unless it were a case of self-sacrifice on the part of the former instead of anticipated pecuniary remuneration for physically caring for the latter, would be evidence of a design to exercise undue influence and so obtain the pecuniary element by fraud. That is unsound. There is nothing improper about such a marriage, intelligently entered into and characterized by mutual respect, enabling the parties to live peacefully and sympathetically together. There could not be mutuality of efficient adequate consideration in such a case, without the element which seems to have been supposed to be unworthy. There is nothing about such an element, by itself, to arouse even a suspicion of fraudulent intent. Therefore it was error to take such circumstance as a foundation badge of fraud and look thence for evidentiary details of a confirmatory nature.

On the point of whether the final disposition by Mr. Ball was unnatural we do not overlook the two incidents mentioned, that Mr. Ball did not recognize the moral obligation to reimburse his son *Roy* on account of the latter's $600 in notes used by the former so many years before his death that the legal right to be paid therefor had been extinguished by the statutes of limitations, and the like moral obligation to his son *Charles* for $400 of borrowed money. Assuming absence of a clear preponderance of evidence against there being

such claims (and we will say in passing the evidence is not very satisfactory in favor thereof), Mr. Ball may well have thought the part reaching the sons of the thousand dollars of insurance money, under all the circumstances, pretty well evened up the account from a moral standpoint.

We will turn from the general features of the case to the first of the three primary essentials of undue influence, viz.: opportunity to commit the fraud. The trial court found that, easily, from the circumstance that Mr. and *Mrs. Ball* lived, mostly, by themselves from the time of the marriage till the end. He was customarily, until near the last, during business hours, like any business man, away from his home. There was no unnatural exclusiveness in the home life, so far as we can see. Except for an incident of *Roy's* wanting to speak with his father about business matters between them, and *Charles* calling once or twice when *Mrs. Ball* thought the father was resting and did not wish, or ought not, to be disturbed, there is nothing to show that they, or any one else, was not free to see and talk with the sick man upon any proper occasion. He associated with *Roy* every day before the last sickness, saw him once afterwards, and he was free, so far as appears, except for his own fault, to help take care of his father at any time. The reason why he did not offer to do so will appear later. That Mr. Ball was protected from disturbance, under the circumstances, and *Mrs. Ball* endeavored to have only such persons with him as were needed for his proper care, is the usual thing and may well have been advised by the physician. So, while there was opportunity for undue influence to the extent, merely, that Mr. and *Mrs. Ball* lived in the seclusion and exclusion of married life, such is not the kind of opportunity, in general, referred to in such cases as this. The ordinary privacy of married life is not to be looked upon as opportunity for one of the pair to commit a fraud upon the other. There must be pretty conclusive proof of active efficient efforts to improperly seclude the person,

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said to have been defrauded by another, where the alleged wrongdoer and the alleged victim are husband and wife, to give the mere period and zone of isolation, even an atmosphere of suspicion.

On the next primary element in a case of this sort,—"a subject unquestionably susceptible to undue influence,"—we are at a loss to discover any satisfactory evidence. Mr. Ball, by the uncontroverted evidence, even up to and for some time after the day when he made his testament, was a strong-minded, self-willed man. He gave very decided orders with reference to his business affairs, and firmly insisted upon their being carried out. There is no medical testimony, sufficient to carry any substantial weight, that up to the time the will was made his infirmities had seriously weakened his mind. There is no evidence that he was solicited to make the will or with reference to anything in it. The idea of making the will and the ideas which were embodied in it, appear, by all the direct evidence, to have been his own. He sent for the lawyer to draft the paper. True, he made his wife his messenger, but why not? There is not even a ground for suspicion in that. He knew, with much definiteness, what he had to dispose of by will, rightly thought it was but little, that he was under great obligations to his wife and was likely to be under still greater, before he died. He dictated what should go into the will, entirely separate and apart from her and with very full appreciation of what he had, what it was worth, and who were his heirs at law. All such matters were spoken of. Later the draft supposed to respond to his wishes was read to, examined by, and decidedly approved by him. It was then executed without *Mrs. Ball* having any knowledge of what was in it or having anything to do with it, according to much and all the direct evidence, except that at the request of Mr. Ball she was the messenger sent to obtain presence of a person, suggested by him, for one of the witnesses. He was strong enough to arise from and sit on the edge of his bed

while signing the paper and repulsed the suggestion of helping him. He showed then and for several days thereafter the self-will which had always been characteristic of his life. The paper was left in his possession at his request. All there was of a secretive character about keeping it from the public, was according to the natural order of things and at his request. He lived for about a month after the will was made, and, except the last few days at least of his life, was sound mentally. The direct evidence is full in respect to all these matters and so persuasive that we cannot well escape the conclusion that there is no legitimate basis in the record for holding Mr. Ball, at the date of his will, to have been, unquestionably, subject to undue influence.

We might stop at this point, but it will emphasize the result which must be reached by referring to a few of the infirmities, in detail circumstances, which evidently had much to do with the decision below. It is said, *Mrs. Ball* took Mr. Ball to her home to live when they intermarried and that it was some distance from where he formerly resided. What wrong was there in that, or suggestion of improper design under the circumstances? She had a home and Mr. Ball did not. True, it was a few blocks from where he formerly lived, but was easily reached in a few moments' walk. The circumstance, though given much significance in the decision, really seems too unimportant to cut any figure in the case.

Mr. Ball, it is said, endeavored to have his wife named as beneficiary in the policy of insurance. No such subject is mentioned in the opinion, but it is given significance in the findings as if it required explanation by *Mrs. Ball* in addition to her positive direct testimony that she had nothing to do with it. Why such matter required explanation, is not perceived. Mr. Ball, as before indicated, took out the policy in favor of his first wife in the usual way. After she died, regardless of the real status, that he thought the policy belonged to him, and supposed that he had a right to carry out his pri-

mary idea of his surviving wife being the beneficiary, is most natural. Most men, circumstanced as he was, especially at the time when he did what the trial court thought suspicious, would have regarded such an insurance policy subject to their disposition. It was a thing which he bought and paid for as much as anything else he possessed. It is not likely he appreciated that, in case of his first wife predeceasing him, the policy would belong to his children. He may well have had in mind, when he married *Mrs. McKelvery,* remembering her for giving him a home and nursing him in his last days, conferring upon her the benefit of the life insurance in addition to her statutory allowances, and that when he was unable to do so, concluded to provide for her as he did.

It is found that *Mrs. Ball* took much interest in her husband's business and, did so increasingly, as his infirmities progressed. Why should not a wife take an interest in her husband's business affairs, more or less, according to his ability to attend thereto without her aid? Would a capable wife omit to do so under such circumstances as Mr. Ball was in? Instead of such an incident as the court referred to being regarded as indicative of a fraudulent design, should it not be looked upon as the very thing to have been expected under the circumstances,—the thing which both parties probably had in contemplation in making the marriage contract?

Mrs. Ball caused the arrest of *Roy* in order to exclude him from the barn, the findings suggest. We fail to discover support therefor. Instead, it appears that Mr. Ball rightly regarded *Roy* to be unsuitable to leave in control of the business and that it was essential to place some one else in charge. He came to that without interference by his wife, so far as the record shows. He consulted his former partner, Mr. Schliesman, in respect to the matter three days after the will was made, resulting in the latter procuring the man Mr. Ball desired to employ, to call. Mr. Ball then acted entirely for himself in making the contract of employment; the employee,

as a condition of his accepting service, requiring the removal of *Roy* from the barn. To accomplish that without ground for objection on *Roy's* part, Mr. Ball sent him the amount due for wages and made Schliesman, not *Mrs. Ball,* the messenger to persuade *Roy* to vacate, which he refused to do; characterizing his act by very abusive language respecting his father. Failing of the purpose of his errand, Mr. Schliesman reported to Mr. and *Mrs. Ball;* first to the latter who suggested seeing a lawyer, very naturally, then to the former; giving the opinion that legal proceedings would be required. Thereupon Mr. Ball said to his friend that he would attend to the matter himself and not bother Mr. Schliesman further, called his wife in and repeated that in her presence, and then, after expressing full appreciation of his approaching end, asked Schliesman to bear witness to his wishes respecting his funeral and burial; giving specific directions regarding the same, and saying that his wife would pay his debts, indicating appreciation of the fact of her appointment to handle his estate.

The last of the three visits by Mr. Schliesman was four days after the will was made and he expressed the opinion that Mr. Ball then was as clear in mind as ever. If there be anything, characterizing the affair of *Roy's* being compelled to leave the barn, indicating that his father did not masterfully direct it himself and according to his own ideas, we cannot find it in the record. Why the suggestion that *Mrs. Ball* acted vindictively in the matter because she carried out her husband's directions, where necessary to aid what he, for good reasons, desired to accomplish?

The further circumstance is mentioned to show that *Mrs. Ball* perverted her husband's mind as to his children, that she gave her two-year-old claim against *Charles* for laundry work to a lawyer for collection. The debt was contracted before her marriage. *Charles* made no claim but that he owed it and testified that his father probably sanctioned her effort

to collect it. Why should not she have taken the course she did to coerce the young man into paying the bill he owed her for washing? It was contracted when he had no claim, moral or otherwise, upon her for gratuitous services. He was abundantly able to pay the bill. Why is there anything in the incident to the discredit of *Mrs. Ball*? Furthermore, as we read the evidence, contrary to the finding, the claim was not given to the lawyer for collection before a demand was made upon *Charles*. He testified, "She gave the claim to Charles Smith, attorney, after I refused to pay it." Mr. Ball may well have been indignant because of his son refusing to pay the laundry bill and thought to discipline him in the matter, as was done. Certainly the incident is not worthy of any consideration against *Mrs. Ball*.

As indicative of undue influence having been exercised and being active and efficient after the will was made, an incident of Mr. Ball having spoken in a very complimentary way to Mr. Schliesman in regard to the manner his wife was caring for him, considering his very bad condition which required close attention and services of a nature very difficult to obtain or render, all of which Mr. Schliesman had observed for himself; also the fact of Mr. Ball having requested that the making of his will might be kept secret, which was a perfectly natural thing, and other matters which, from our viewpoint do not fairly admit of any inference unfavorable to the proponent of the will.

It does not seem necessary to prolong the discussion. The only fair excuse for treating the case with so much fulness as we have is the fact, as it seems, that efficient undue influence was found from many circumstances which, as we look at the matter, hardly are of sufficient weight to arouse suspicion. Some really convincing evidentiary circumstances or direct evidence of undue influence is necessary in a case of this sort, particularly, where the alleged wrongdoer and the victim were husband and wife. Setting aside a man's will is a

very serious matter in any case. It should not be done on mere suspicion or inconclusive circumstances. Proceedings in respect to such a matter should be with special care, where testamentary capacity is evident and the result may lead to defeat an apparent purpose of the testator to make his wife his beneficiary on account of peculiar circumstances, and the amount of property involved is quite moderate. To turn incidents of such wifely attention to a husband in his last days as a capable, faithful woman in good health, may and would be naturally expected, to bestow, so as to have the cast of an attempt to perpetrate a fraud, would be going too far. It seems that the evidence was not considered from quite the proper legal standpoint,—that inferences of wrong doing were deduced from incidents which were natural, rightful, and commendable, and that the refusal to admit the will to probate should not be sustained.

By the Court.—The judgment is reversed, and cause remanded with instructions to reverse the judgment of the county court and to establish the will and remand the proceedings to such county court with directions for the settlement of the estate under the will. Costs taxed in this court to be paid out of the estate.

BARNES, J. (*dissenting*). In the opinion of the court it is in substance said that to exert undue influence over a person who is about to make a will amounts to the perpetration of a fraud, actual or constructive; that such fraud must be established by clear and satisfactory evidence; that the trial court acted upon the theory that the use of undue influence might be established by a preponderance of the evidence only; and that the judge having acted on a wrong conception of the law in arriving at his conclusions on the facts, the rule that findings of fact will not be disturbed unless against the clear preponderance of the evidence has no application to the case. Starting from this fundamental basis, the court proceeds to discuss the evidence as though the case were being tried *de*

novo in this court. The conclusion having been reached that undue influence was not proved by *clear and satisfactory evidence,* the court elaborates on the evidence favorable to the proponent and minimizes that favorable to the contestants, apparently overlooking the fact that where there was a legitimate conflict in the evidence the trial judge had the right to give credence to the evidence of the contestants if he believed it to be true, and overlooking the further fact that where conflicting inferences might be drawn from the testimony, those favorable to the contestants might be arrived at.

The writer has never been impressed with the soundness of the rule that fraud must be proved by clear and satisfactory evidence. It is not a rule of universal acceptance, nor is it one that has always found favor in this court. It throws a protective mantle over the *prima facie* wrongdoer and enables him to profit by his own wrong if the party claiming relief is unable to make out a strong case of injury. The reason for the rule, it is said, is that there is a presumption against wrong doing—of innocence, so to speak,—and that in order to overcome this presumption a higher degree of proof must be forthcoming than is ordinarily sufficient to warrant a recovery. It might, I think, be said with equal force that there is a presumption that the individual will not violate his contract or commit an assault and battery, or the crime of seduction under promise of marriage, or do a multitude of other things. Yet, where an action is brought to recover damages resulting from any of these acts, a preponderance of evidence is a sufficient basis for a recovery. This much is said, not because the writer thinks the rule of evidence in reference to fraud should now be changed by the court, but because it is thought that the rule is somewhat arbitrary and illogical, so much so that it should not be extended so as to cover a class of cases to which it has not been heretofore applied. If I read our decisions correctly, it is now held for the first time that a will cannot be set aside on the ground of

"undue influence" unless the proof of such "influence" is *"clear and satisfactory."* Such a rule, if adhered to, would make it well nigh impossible to set aside a will or deed for this cause. Such influence can hardly ever be proved by direct testimony. Those exercising it do not proclaim the fact from the housetops. It is secretly and often insidiously practiced. When found at all it must be by inference drawn from other facts. It is an incongruity to say that a thing must be proved by clear and satisfactory evidence and to say at the same time that it may be established by a mere inference, even if the inference is strong.

The sanctity of a will by which a testator disposes of his property is not greater than is that of a deed by which property is disposed of, in so far as the heirs or relatives of the deceased person are concerned. The cases all recognize the rule that the heirs at law of a decedent can set aside a deed or a will executed as a result of undue influence on precisely the same showing. The circuit judge in his opinion stated that the contestants made a *prima facie* case of undue influence, and, having done so, the burden was upon the proponent to show that the will was the testator's voluntary act. The opinion of this court is to the effect that, while this error might be excusable in view of what the court said in the cases of *Davis v. Dean,* 66 Wis. 100, 26 N. W. 737; *Disch v. Timm,* 101 Wis. 179, 77 N. W. 196; and *Vance v. Davis,* 118 Wis. 548, 95 N. W. 939, still those cases, correctly understood, do not support the conclusion of the trial judge; and it is further said that if any misleading expressions were used in these cases they were eliminated from our jurisprudence by the decision of this court in *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220, from which a lengthy quotation is made.

I think the circuit judge stated the law correctly and that it has been the settled law of this state for a long time that where one person stands in a relation of confidence and trust to another, and where the opportunity to exercise undue influ-

ence is shown to exist and where the disposition is likewise shown to exist, and it is further shown that an unnatural disposition of the property is made in favor of the party occupying the trust relation, a *prima facie* case of undue influence is made.

Such was the rule before *Winn v. Itzel* was decided. It has been the rule since that case was decided, and nothing is said to the contrary in that case, as I read it.

In *Davis v. Dean, supra,* it was said:

"We do not say that fraud and undue influence were proved affirmatively, but only that the circumstances suggest them. If the burden of proof is upon the plaintiffs to show such fraud or undue influence, probably we could not disturb the findings of the circuit court which negative their existence. But under the circumstances of this case the burden of proof is not upon the plaintiffs. Because Mrs. Sparrowk stood *in loco parentis* to George, and their relations to each other were those of trust and confidence, and because of the suspicious circumstances under which the conveyances were made, and the injustice which will be inflicted upon the heirs of the grantor if the conveyances are held valid, the law casts upon the grantee the burden of showing that the conveyances are untainted with undue influence or other fraud, but were the intelligent and deliberate act of the grantor. This rule is to protect the weak and unsuspicious from the cunning and fraud of those who stand in confidential relations to them, and has its foundation in good morals and sound public policy. The grantee has failed to satisfy the requirements of the rule, and the presumption of injustice, fraud and wrong stands against the conveyances, which he must remove before the court is authorized to say that they are valid. This he has not done, and for that reason, also, his deeds must be canceled and held for naught."

In *McMaster v. Scriven,* 85 Wis. 162, 55 N. W. 149, the above rule was recognized, but was held not to apply to that case because the beneficiary in the will did not stand in a fiduciary relation to the testatrix, and therefore the burden of showing undue influence was upon the contestant of the will.

In *Cole v. Getzinger,* 96 Wis. 559, 573, 71 N. W. 75, it was said:

"The general principle is that where, from the nature of the transaction and the situation and relation of the parties, fraud and imposition may be presumed, unless their presumption be rebutted, relief will be granted in equity, although fraud in fact be not proved."

That portion of the opinion in *Davis v. Dean* above quoted is also quoted in the opinion in this case and is approved.

In *Doyle v. Welch,* 100 Wis. 24, 27, 75 N. W. 400, it is said:

"The salutary rule that, where a voluntary conveyance is made by an aged person of his entire property, without consideration, to one who stands in a position of trust and confidence to him, under circumstances of secrecy, the burden of proof is upon the grantee to show that the conveyance was untainted with undue influence or fraud, has been frequently laid down by this court."

In *Disch v. Timm,* 101 Wis. 179, 77 N. W. 196, the case of *Davis v. Dean* was again considered, and the doctrine quoted therefrom was expressly approved, and the principle is approved in *Will of Slinger,* 72 Wis. 22, 37 N. W. 236.

In *Small v. Champeny,* 102 Wis. 61, 78 N. W. 407, the court uses the following quotation taken from the case of *Disch v. Timm, supra:*

"When opportunity and the disposition to influence the act of another are shown, a presumption of undue influence arises, and the burden of proof is then on the party charged therewith to show that such other acted intelligently and voluntarily."

In *Fox v. Martin,* 104 Wis. 581, 80 N. W. 921, the rule is again fully recognized, but was held not to apply in that case because the beneficiaries under the will did not stand in a confidential relation to the testator.

In *Loennecker's Will,* 112 Wis. 461, 467, 88 N. W. 215, the court again held that in order to raise a presumption of undue influence in making a will, which throws the burden

of proof upon the beneficiary, there must be shown a subject susceptible to such influence, clear evidence of opportunity, and a disposition on the part of the beneficiary to exercise such influence. It is said:

"When these facts are shown to exist, and especially when they exist with other facts out of the usual course of business transactions of such a nature, the presumption will arise which will put the beneficiary to his proof of good faith and freedom from undue influence. Whether the testimony shows these preliminary facts with sufficient clearness and certainty is a matter to be decided by the trial court."

In *Vance v. Davis,* 118 Wis. 548, 551, 95 N. W. 939, the court used the following language:

"Absence of such direct proof is, however, not final, for, in apparent contradiction of the ordinary rule requiring clear and direct proof of fraud, this and other courts have recognized the necessity of casting the burden of negative proof upon one who profits from a position of confidence and control by a conveyance of such character and made under such circumstances as to suggest improbability that it is the free act of the grantor, and probability that it is due to influence of the beneficiary, which his confidential relation makes easy, but renders difficult or impossible of direct proof."

Referring now to the case of *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220, I do not understand that it lays down any doctrine that is contrary to the cases above referred to. It simply holds that, where the party attacking a will or a deed has made a *prima facie* showing, the other party must offer evidence to show that no undue influence was exercised, and that on the whole case as thus made up the burden of proof rests upon the plaintiff to prove the undue influence. The words "burden of proof" as used in the prior cases are not of course to be understood in their exact technical sense. The plaintiff in any case has the burden of proof on his affirmative allegations of fact from beginning to end of the case; strictly there is no shifting of this burden, but when the plaintiff has made his proofs and the defendant takes up the

case, he takes the laboring oar and has for the time being the "burden" of the controversy, and in this sense the words are used. This distinction was, it seems, fully explained in the *Itzel Case.* As I read that case, it was not intended thereby to change any established principle theretofore laid down. In that case the trial court had evidently understood that the "burden of proof" in its strict and technical sense was shifted in a case of alleged undue influence, when the plaintiff had shown the required relation, opportunity, disposition to influence, and the unnatural disposal of property, and had required the defendant to assume the affirmative at this point, and then allowed the plaintiff to come in with additional affirmative proof of undue influence at the end of the defendant's testimony. This method of trying the case was condemned, and it was shown that the burden of proof in its strict sense remained with the plaintiff on his affirmative allegations from beginning to end of the case as in other cases, and that the plaintiff should put in all his evidence both direct and circumstantial in making his case. This was what was decided in the *Itzel Case* as I understand it, and nothing further.

The case of *Boyle v. Robinson,* 129 Wis. 567, 109 N. W. 623, is to the same effect.

In the still later case of *Quinn v. Quinn,* 130 Wis. 548, 110 N. W. 488, it was held that in case of a conveyance by an aged person susceptible to undue influence, of his entire property without consideration, to one in a position of trust and confidence, under suspicious circumstances which satisfactorily suggest the wrong, accompanied by proof of opportunity and disposition on the part of the beneficiary to exert influence, there arises a presumption that the conveyance was so induced, unless the grantee can negative that fact by direct proof. This was an action brought by the heirs of a deceased intestate to set aside a deed made by decedent in his lifetime.

So I think it clearly appears from our former decisions that the trial judge was standing on solid ground when he reached the conclusion that it was incumbent on the contestants in the first instance to make out a *prima facie* case only, and that they were entitled to judgment unless their *prima facie* proof was overcome by evidence offered on behalf of the proponent. I have been unable to find a single case dealing with undue influence, among the many decided by this court, where it has ever before been intimated that the rule of evidence applicable to fraud applies. On the contrary, the burden of showing good faith and honest and fair dealing is thrown on the party who unduly profits by the will of a deceased person, where the parties occupy a position of trust and confidence toward each other and where opportunity and a disposition to exercise such influence are shown to exist. Changing a prevailing rule of evidence to help out a woman who after living for a time in "honorable widowhood" marries an old man from philanthropic motives has its drawbacks. We do not know how soon we will have a case where an artful, designing woman may marry an old man who is a victim of chronic alcoholism and whose days are numbered, for the purpose of securing the property which in good conscience should go to others, and when such a case does arise we will not be proud of the innovation.

I think the circuit judge is accused of carelessness in making findings of fact of which he is not guilty. I quote:

"In the opinion [of the circuit judge] the net estate was placed at $3,500, while, as before indicated, the figures were raised to $4,500 in the findings."

And further: "The findings are to the effect that the net estate was of the value of $4,500, but that seems clearly contrary to the evidence to the extent of more than $1,500," etc.

It is said that the estate is not worth, above debts, to exceed $3,000, and that the matter of expense of administration and of an allowance for the widow pending settlement was entirely overlooked. This latter statement is mere surmise.

What the trial judge said in his opinion was that the "will attempts to give all of his property, which, over and above debts, will amount to *about $3,500,* to the widow, who married deceased a little before his death and had no part in the accumulation of the property, and to disinherit his three children, who appear always to have been dutiful and affectionate and from whom he had never been estranged." No doubt the figures were given from memory and purport to be only an approximation, and vary but $500 from what this court finds to be the true amount. As a matter of fact the trial court did not overstate the net value of the estate, unless proof of the fact that certain claims had been filed against the estate was proof that such claims were owing. There was *prima facie* proof of unsecured claims to the amount of $900, and no more.

Turning to the findings which are said to be in conflict with the opinion rendered, they neither pass upon nor purport to pass upon the net value of the estate. The reason for this is obvious. The contestants were successful. The largest unsecured creditor was the proponent herself. Her claim exceeded the claims of all the other unsecured creditors combined. The court was careful not to make any finding in reference to claims which would stand in the way of contesting any unsecured claim. What the court does find is that the testator "had accumulated property which at the time of his death was of the value of about $6,500, against which there was an indebtedness of $2,000 *secured by mortgage on his real estate.*" The proof showed that there were outstanding real-estate mortgages on which there was $1,900 principal and $100 interest due. There was no disposition, apparently, to question the *bona fide* existence of this indebtedness, so the amount of it was stated.

The circuit judge found (1) that the opportunity existed to unduly influence the testator; (2) that he was susceptible to such influence; and (3) that such influence had been exerted upon him. If these conclusions of fact are not against

the clear preponderance of the evidence, the judgment setting aside the will should not be reversed. It might be remarked here that the county court reached the same conclusion as did the circuit court. The judges of both of these courts had the superior advantage of seeing and hearing the witnesses, and this court should not disturb their conclusions on questions of fact unless it satisfactorily appears that the clear preponderance of the evidence is against them.

There is no doubt that the proponent of the will, living alone as she was with the testator who was on his death bed, had all kinds of opportunities to influence him if she so desired.

I think there is little doubt that the evidence warranted the conclusion that the testator was susceptible to undue influence. He was past seventy years of age when he made his will. He had daily consumed large quantities of alcoholic liquors for twenty years or more, gradually increasing the amount of consumption as he grew older. His drinking habits produced cirrhosis of the liver, as well as a badly diseased condition of the stomach and bowels, from which he died within less than a month after the time of making his will. He was also suffering from an open fistula. Diseased as he was, whisky was necessary to his existence up to the end of his life, so much so that his physician prescribed its use in moderate quantities. He was suffering much pain. While occasionally there were flashes of the old fire, it was very apparent that his once strong and robust constitution had become shattered by the long and excessive use of intoxicants and by the complication of diseases that resulted therefrom. These facts are undisputed and indisputable. The strong, self-reliant, and positive character had fought a long battle with a more powerful enemy than himself, and towards the end, with shattered nerves and three badly diseased vital organs, he was forced to succumb in the unequal contest. It may be admitted that he talked sensibly and naturally to the

attorney who drew his will. This attorney, however, was practically a stranger to him, who had no opportunity to know him as he once was, and had little opportunity to know whether he was expressing what would be his wish if he were his old self or was expressing the desire of the strong self-confident person in whose keeping he was. The testator also talked rationally to his old partner, Schliesman, a couple of days after he made his will. This fact would be important on the question of his sanity, but has very little to do with the claim that he was in such a condition as to be easily dominated and controlled by his wife, on whom he was obliged to call for care and attention during his last illness. It was not necessary to resort to the testimony of experts to show that his mind and his will power were deeply affected by alcohol and disease. The dominant facts stand out that as dissolution approached the victim was racked with pain and was supplied with liquor, and that his condition was brought about by the continuous and excessive use of stimulants. He was unable to sign his name to his will in such a way that those who were familiar with his signature could recognize it. My observation as to the effect of disease and alcoholism is not such as to justify me in saying that the conclusion reached by the county and circuit judges is against the clear weight of the evidence. On the contrary, as an original proposition I should be inclined to say that the conclusion of these two judges was the most rational one to draw, and the evidence of the expert witnesses was ample to sustain it.

Susceptibility to influence as well as opportunity to influence having existed, the last, and, it may be admitted, the closest, question remains to be considered, and that is, Was advantage taken of the opportunity? The exercise of undue influence can rarely be proven by direct evidence. It is not usually exerted in the presence of a third person. The proponent and the testator were living alone, so that direct proof was impossible. In most of the decided cases upon this ques-

tion where undue influence was found, it was deduced from other facts and circumstances established by the evidence. Were sufficient facts shown here?

Perhaps the strongest fact shown was that the proponent married the deceased. At the time of the marriage he was sixty-nine years old and she was some eighteen years younger. She had been twice married and had some property, at least a house and lot, and $900 which she loaned to the testator before the marriage. After the first Mrs. Ball died in 1905, proponent kept house for the deceased for two and a half years. She knew that he was old and that he had been a steady heavy drinker for many years; that in all probability he was past reformation, and that without it his days were practically numbered. He might live a few months, possibly a few years, but the chances were very much against his being able to live very long. She hardly married him for love. She did not need to marry him for a home, because she had one of her own. She might have taken pity on him and thought she could reform him, but she probably had better sense at her age in life. At least the most plausible explanation of her action is that she knew she would at least get some of his property and perhaps all of it. If the task was uninviting, the time of it might be short and the reward ample. This inference may be obnoxious, but it does more credit to her good sense and good judgment than any other that occurs to me.

The testator made an unusual if not an unnatural disposition of his property. Its value, after deducting claims filed and mortgages, was substantially the amount found by this court, if it be conceded that proof that claims to a stated amount were filed against the estate is *prima facie* proof of their correctness. All of the property was given to the widow. The deceased left a life insurance policy which was payable to his first wife or her heirs, on which $1,100 was collected, which sum was divided among the three children.

He attempted to assign this policy also to his wife, but found that he could not do so without the consent of the beneficiaries.

The parties had been married but fifteen months at the time the testator died and all of his property had been acquired before the marriage. There was testimony tending to show that the proponent was not only endeavoring to prejudice the deceased against his children, but that she succeeded in doing so. At about the time the will was made or within a day or two thereafter she had the son *Roy* arrested because he refused to leave the livery stable and he was fined a few dollars and sent to jail in default of payment of the fine. The other son, *Charlie,* testified that she told him she would fill *Roy* full of lead if he came around the house.

During part of the two and a half years that she acted as housekeeper *Charlie* lived in the family with his father and she did the family washing. A short time before the will was made she placed a bill for the washing in the hands of her attorney for collection. *Charlie* further testified that when his father was first taken ill she told him point blank over the telephone that she would not allow him to see his father, and that he was unable to see him until ten days or two weeks thereafter, at which time he was very low and paid little attention to what was going on.

The testator and his children had always been good friends until a few months before the death occurred. *Roy* had contributed $600 to the livery business which his father carried on at one time, but the claim is now barred by the statute of limitations. *Charlie* had contributed $300. His claim is also barred. The making of the will was kept secret. This in itself, if not a badge of fraud, "is surely a badge of undue influence." *Watkins v. Brant,* 46 Wis. 419, 425, 1 N. W. 82; *Cole v. Getzinger,* 96 Wis. 559, 572, 71 N. W. 75; *Fox v. Martin,* 104 Wis. 581, 593, 80 N. W. 921. The proponent was active in securing the execution of the will. This

is a persuasive badge of undue influence. *Will of Slinger,* 72 Wis. 22, 37 N. W. 236; *Smith v. Henline,* 174 Ill. 184, 51 N. E. 227; *Sullivan v. Foley,* 112 Mich. 1, 70 N. W. 322. Another circumstance worthy of mention is that the attorney for the proponent was called in to draft the will, he being a comparative stranger to the testator. There were some other minor circumstances which the court might properly have taken into account in reaching the conclusion which was reached.

It is true that the proponent denied or explained the most damaging testimony that was given by the two sons, but it is none the less true that there was a question of veracity involved between the witnesses and that the court saw them and heard them and might believe the sons and disbelieve the widow. I am unable to arrive at the conclusion that the inference that undue influence was exercised upon the testator is against the clear preponderance of the testimony, and I think the judgment should be affirmed.

The following opinion was filed April 21, 1913:

WINSLOW, C. J. (*dissenting*). The circuit judge who tried this case tried it with his usual care and ability, and wrote a comprehensive opinion which demonstrates his close study of the case. In my judgment there is no foundation for the thought that he applied any wrong rule of law to the case. The rule is that when a plaintiff or contestant in such a case as this has shown (1) a person unquestionably subject to undue influence, (2) opportunity to exercise such influence, (3) a disposition on the part of the person charged to exert the influence, and (4) a result clearly appearing to be the effect of the supposed influence, he has established a *prima facie* case of undue influence which must be met, or it will prevail. I do not understand that this rule is shaken or questioned in this case.

Let it be admitted, as held in the opinion, that these four facts must be proven by clear and satisfactory evidence before the *prima facie* case is made, still I think the trial judge's opinion clearly shows that to his mind these four facts were so proven.

As to the first fact he says:

"Examining the evidence in this case, I find that the testator was at the time of and just before making his will a person susceptible to the influence of one in whom he might repose confidence or upon whom he might be dependent.

"He was seventy years old, was and for some time had been greatly enfeebled by disease, had for many years used intoxicating liquors excessively, particularly in the later years, his alcoholism had brought upon his fatal and now rapidly progressing disease of the liver, the final stage of which is cirrhosis and cessation of function. His physical system was giving out in many particulars. For months he had been unable to go to his place of business except by conveyance, and two days before making his will retired to his home and his bed, never again to leave his room alive. There can be no doubt that in his then enfeebled condition, no matter how strong had been his character before, he must have felt helpless and dependent and easily subject to any strong influence that might be brought to bear."

A fact about which there can be no doubt must certainly be one that is proven by clear and satisfactory evidence.

As to the opportunity there is no dispute; as to the disposition the judge says:

"It appears that the proponent had the capacity and disposition to exercise strong influence. She was a vigorous and strong-minded woman of fifty-one years. Her marriage to the deceased was her third. She appears to have considerable business capacity. Her marriage to the deceased when he was nearly seventy years old, broken in health and burdened by age and his bad habit of alcoholism, was either very self-sacrificing upon her part or the result of a design to financially profit by the marriage. It seems to me it was the latter. She took the deceased completely into her charge and to her

own home and showed a disposition to disconnect him from his children, particularly as he neared the end. Her employment of an attorney to collect of the son *Charles* a laundry bill, claimed to have been incurred two or three years before, without previously asking for payment and without *Charles* knowing that he was indebted, seems much like an effort to put *Charles* at arms'-length. She made herself acquainted with the business of the deceased, and about the time of the execution of the will, or soon after, acted vindictively in dismissing the son *Roy* from the livery business. From the time when deceased became confined to his house until after he was too ill to consider business the sons had no opportunity to see the father, and opportunity was by proponent at least on two or three occasions refused. She was active in making arrangements for the drawing of the will, and the attorney was called whom she had personally employed to collect the laundry bill against *Charles*. All things considered, I feel that the ability and disposition on the part of proponent to get from the deceased all property she could, existed."

The array of facts above stated, all of which are amply proven, point irresistibly to the conclusion that the disposition to influence existed in this case, and I construe the circuit judge's words as meaning that he so concluded.

As to the fourth fact he says: "Lastly, the will made and here propounded appears *clearly* to have been the effect of some strong influence on the deceased," and he then collates the facts which seem to him to demonstrate this fact.

So we have the second of the necessary facts, *i. e.* opportunity, admittedly existing, and of the other three we have the circuit judge's deliberate statement that as to the first there is "no doubt," as to the third "it appears," and as to the fourth "it appears clearly." In view of these declarations of the trial judge, it seems to me there is no room to say that he applied any wrong rule of law to the case.

No one questions the sacredness of a will, nor the importance of upholding the right of every man to make his will and have its provisions faithfully carried out. It should be re-

membered at the same time that it is just as important that a document which is not in fact the will of the testator, but is the expression of the wishes of a strong and cunning mind which has overpowered the mind of the testator, should be set aside.

The trial judge decided, after seeing the witnesses and carefully considering the evidence, that the latter case was the case presented here. I think his decision should be affirmed unless we are ready to say that our oft repeated declarations of the dignity to be given to a circuit judge's findings of fact are to become mere sounding proclamations.

KIMBERLY-CLARK COMPANY, Appellant, vs. PATTEN PAPER COMPANY, LIMITED, Respondent.
SAME, Respondent, vs. SAME, Appellant.

February 21—April 8, 1913.

Waters: Dams: Grants of water power: Determination of rights of respective grantees: Equity: Parties: Limitation of actions: Adverse possession: Laches: Former adjudication: Privity: Deeds: Construction: Velocity at which water is to be taken: Width of opening: Stare decisis: *Practical construction: Use of water on specified premises: Actual or theoretical horse power.*

1. In an equitable action between two of the grantees of separate interests in a water power, to determine the extent of their respective rights in the water and to restrain wrongful invasion of or interference with the rights of the plaintiff therein, other grantees of similar rights though proper are not necessary parties.
2. Where both parties to such action were using the water as of right, and the injury consisted in one continuing from day to day to use more than his proper share, each taking only the water as it flowed by for the creation of power, and the volume fluctuated so that at times the utmost use by either did not exceed his right and at other times the volume was so small that the use by one did encroach upon and impair the right of

the other, no statute of limitations or adverse possession will bar an action to redress such wrong.

3. So, also, where the defendant in such action interposes a counterclaim alleging similar wrongs on the part of the plaintiff and asking affirmative relief, thereby opening up the whole subject of the several grants for equitable consideration and decision, neither the defense of limitation nor that of laches will avail him.
4. Where the rights of the grantor of a residuary interest in a water power had been adjudicated prior to the grant, his grantee, being in privity with him, is bound by the decree.
5. But as to a grant of a partial interest in such water power made by the same grantor, prior to the decree, to one who did not become a party to the suit in which that decree was made, although such interest finally vested by mesne conveyances in the grantee of such residuary interest and the water taken under both grants was commingled in use at its mill, such residuary grantee is not estopped nor conclusively bound by the decree.
6. In judgments or decrees which do not determine status, but relate to property rights or interests, privies are those who succeed to the ownership of that property, or some right or interest therein, under one of the parties to the litigation.
7. In a grant of water power, if the size of the opening only is given and the volume of water is not otherwise fixed by the terms of the grant, the water should be taken at its most efficient velocity, namely, at the rate of two feet per second; but this rule does not apply to a grant of so much water through a specific opening as the grantee may need for whatever machinery may be erected on certain described premises, where such machinery requires a volume greater than would be obtained at that velocity, even though the drawing of the water at an increased velocity is wasteful. [Whether, after having erected machinery on the premises in question requiring for its operation a certain amount of power, the grantee could increase the volume of water to which it was entitled under such a grant by thereafter erecting machinery on said premises requiring a greater amount of power, not decided.]
8. Where a grant was made of water to be taken from the south fifteen feet of a certain bulkhead, and the aperture made by the grantee was thirteen feet six inches wide, the balance of the fifteen feet being taken up with the side walls or supports of the flume and opening in the bulkhead, it was no ground for equitable interference that the timbers supporting such walls extended sixteen inches beyond the fifteen feet, where they did not encroach upon the property of the plaintiff.

9. In the construction of a grant the doctrine of *stare decisis*, though the decision be between other parties, and the practical construction and long acquiescence therein by the parties to the grant and their assigns, are entitled to much weight.
10. Where a grant was of the right to draw and use for hydraulic purposes "so much water as not to exceed in all 200 horse power," and this was followed in the same instrument by a covenant for quiet enjoyment which described the thing granted as "200 horse power net," it is *held* that the words "horse power" in the granting clause were ambiguous, as meaning either available or theoretical horse power, and the use of the word "net" indicated that actual or available horse power was intended.
11. In a grant of water power the words "so much water not exceeding 1,000 inches as [the grantee] may need for any machinery which he or his assigns may erect" on a certain lot, are construed to mean water for use in driving machinery on the designated lot only.
12. The evidence in this case is *held* to sustain findings to the effect that certain grants of a specified number of inches of water meant theoretical inches, and grants of specified horse power meant theoretical horse power.

APPEALS from a judgment of the circuit court for Fond du Lac county: CHESTER A. FOWLER, Circuit Judge. *Affirmed.*

This suit was commenced November 10, 1903, for the purposes (1) of determining what volume of water the defendant is entitled to draw from that mill-pond which furnishes the so-called "West Water Power;" (2) restraining the defendant from withdrawing from said mill-pond more than the volume of water so determined; (3) restraining the defendant from drawing from said mill-pond upon lot 9 of Grand Chute Island in the Fourth ward of the city of Appleton as per John Stevens's map of 1879, more water than sufficient to furnish 700 horse power; (4) for damages for past excessive use of water.

The defendant interposed (1) a plea in abatement for defect of parties; (2) a plea of the ten-year statute of limitations; (3) an answer to the merits; (4) a counterclaim calling for the ascertainment and determination of the water power which plaintiff and defendant own under their respec-

tive grants, and the volume of water each is entitled to draw from said mill-pond according to priority of grant, and the places at which they may draw it; (5) restraining plaintiff from using more water or power than the amount so determined; (6) at any other place than the place so ascertained or determined; (7) also seeking an award of damages to the defendant for plaintiff's excessive and wrongful use of water. Plaintiff by reply to this counterclaim interposed defensive matter, but did not plead any statute of limitations. This counterclaim avers a grant of August 27, 1864, by West to Woodward, and that under this and other grants the defendant is entitled to water sufficient to produce at least 675 horse power, making at least 450 horse power under the Woodward grant, and that for six years next prior to the commencement of the action the plaintiff has, by its excessive use of water under other grants, interfered with and impaired defendant's rights under such grants.

Findings of fact well supported established that Grand Chute Island divides the Fox river at Appleton into the north and south channels. About 1857 Edward West, owning said island and the south shore of said south channel, built a bulkhead across the south channel from the head of said island and a wing-dam from such head into said north channel, and those structures made the West water power. In 1870 West made a canal for power from the pond made by said bulkhead and wing-dam, extending about 1,600 feet in the general direction of the river flow, through said island, nearly to its lower end. In 1876 the wing-dam was replaced by a solid dam from the head of said island to the north shore of the river and the said bulkhead was rebuilt higher, whereby, and by flashboards permanently maintained on said dam, the head of said power was increased 2.4 feet. The improvement of 1876 which so increased the head was made by a company and paid for by subscriptions given by the public for the public benefit. The dam was built on land no part of which was

owned by this company, although the owners of the land were members of the company and contributed to the said fund. This company never used or attempted to control any of the water power otherwise than by making a quitclaim deed relating to the West water power to West and his heirs and assigns, declaring that the latter and those holding the lots or water power from or under them might draw water from the pond to fill West's canal and through said bulkhead for hydraulic purposes without let or hindrance by such association.

"The average flow of Fox river at Grand Chute Island is about 150,000 cubic feet per minute, 4-7 of which, or about 86,000 cubic feet per minute, is appurtenant to said West water power. Said flow of the river varies from less than 20,000 cubic feet per minute in dry seasons, to more than 500,000 cubic feet per minute in freshets. To furnish 137,397 cubic feet per minute required to fill all said grants prior to the grant of the remainder and furnish the volume due said north shore of the river, the whole flow of the river must be at least 240,000 cubic feet per minute. For considerably more than half the time said flow is less than 200,000 cubic feet per minute."

"The following table [see page 74] shows the dates, ownership, and power granted of all grants by said West to the parties hereto and to others, prior to said grant of the remainder, and the volume of water and power due each grant at the normal heads at the lots conveyed with the grants respectively; the volume due each grant prior to the increase of head in 1876, wherein no head is specified, of horse power and inches of water being computed at the prior head, and the present power of such volume at the increased head."

West conveyed away his land in parcels and his water power so that after the grant of February 26, 1882, and before the grant of the rest and residue on June 18, 1887, there was considerable land on the north and south sides of the canal belonging to West. This land abutted upon the water power, but by reason of prior grants of water power could not be given a fraction of the water power proportionate to area and location without materially interfering with the prior grants

of power made by West. West did not convey his water power in proportion to the area of land conveyed, and he seems in all cases to have limited the power granted by specifying the number of inches of water or the number of horse power, except in the grant of August 27, 1864, called the Woodward grant, and the grant of June 18, 1887, called the grant of the remainder. Besides the increase of head made by the improvement of 1876, there is an increase in head from the up-stream end at the bulkhead to the down-stream end along the canal of about nine tenths of a foot, and the

Date of grant	Present owner	Limitations	Head	Volume in cubic feet per minute	H. P. at present head
1857					
July 16	Appleton Machine Co..	200 inches	7.1 ft.	1,770	32
Sept. 1	Stebbins.....	25 h. p.	10 ft.	1,330	25
1861					
Sept. 16	Appleton Woolen Mills	40 h. p.	7.1 ft.	2,974	53
1863					
Feb. 7	Appleton Machine Co.	200 inches	7.1 ft.	1,770	32
Dec. 4	Appleton Machine Co.	100 inches	7.1 ft.	885	16
1864					
July 20	Marston & Beveridge..	40 h. p.	7.1 ft.	2,974	53
July 28	Appleton Woolen Mills	20 h. p.	7.1 ft.	1,487	27
Aug. 27	Defendant.....	So much as needed for, etc.		29,419	492
Sept. 5	Defendant.....	1,000 inches	7.1 ft.	8,850	159
1867					
Dec. 23	Defendant.....	20 h. p.	7.1 ft.	2,220	39
1868					
Oct. 8	Toy Company.....	25 h. p.	10 ft.	1,330	25
1869					
April 15	Defendant.....	75 h. p.	7.1 ft.	5,575	99
1870					
April 5	Plaintiff.....	3,000 sq. inches	10 ft.	31,702	600
1873					
Jan. 6	Appleton Woolen Mills	10 h. p.	7.1 ft.	743	13
1876					
Jan. 19	Valley Iron Works.....	40 h. p.	7.1 ft.	2,974	53
1877					
Dec. 4	Marston & Beveridge..	10 h. p.	9.5 ft.	555	10
1879					
Dec. 29	Defendant.....	200 h. p. net.	10.4 ft.	12,602	250
1881					
July 16	Defendant.....	400 h. p.	10.4 ft.	20,208	400
Aug. 17	Webster Planing Mill..	30 h. p.	9.5 ft.	1,667	30
Oct. 19	Appleton Woolen Mills	20 h. p.	9.5 ft.	1,112	20
1882					
Feb. 26	Defendant.....	100 h. p.	10.4 ft.	5,077	100
		Totals		137,397	2,568
1887					
June 18	Plaintiff.....	All power not theretofore transferred subject to all prior conveyances.			

court found that the present normal head is 9.5 feet at the bulkhead and 10.4 feet at the paper mills of the plaintiff and defendant on the canal.

The plaintiff's paper mill, erected in 1887, is situate on the south side of the canal near its lower end, and it claims and owns under said grant of June 18, 1887, all the rest and residue of the water power not theretofore granted away by said West, and also claims and owns under said grant of April 5, 1870, 3,000 square inches of water at a uniform head of ten feet. This latter grant was originally made to the Appleton Iron Company and was included with a grant of a parcel of land at the lower end of the canal now owned by the plaintiff, but not used for any purpose requiring the expenditure of water power. To fill this grant of 3,000 square inches at a head of ten feet requires a volume of 31,702 cubic feet of water per minute. Plaintiff now has in said mill water wheels requiring at a head of ten feet a volume of 63,865 cubic feet per minute to run them at full capacity. This grant of 3,000 square inches of water, if drawn and used on the tract specified in the grant, would be wasted or discharged into the north channel of the Fox river if discharged by the shortest route. Plaintiff wastes or discharges it into the south channel, but this results in no loss or injury to the defendant.

The defendant claims and owns under this grant of August 27, 1864, called the Woodward grant, also the grant of 1,000 inches of water made September 5, 1864, the grant of thirty horse power made December 23, 1867, and the grant of seventy-five horse power made April 15, 1869. The volumes of water required to fill said grants at a head of seven and one-half feet are respectively 8,935, 2,200, and 5,500 cubic feet per minute, which volumes at the present head of 9.5 feet will produce respectively 160, 39, and 99 horse power. No part of the power of either of these three grants has been used on either of the lots with which it was granted since

1885. Defendant also owns power granted by the said West with contiguous lots on the north side of the canal near the lower end thereof, namely, the said grant of 200 horse power net of December 29, 1879, the said grant of 400 horse power dated July 16, 1881, and the said grant of 100 horse power dated February 26, 1882. The volumes of water required to fill said last mentioned three grants at a head of 9.5 + .9 = 10.4 feet are respectively 12,692, 20,308, and 5,077 cubic feet per minute.

The learned circuit court found, upon evidence tending to support such findings, that all grants by West of a specified horse power had reference to a theoretical horse power, and that the actual available horse power is eighty per cent. of this theoretical horse power. In all such grants by West, inches of water meant theoretical inches, evidently using the latter term as employed in *Janesville Cotton Mills v. Ford,* 82 Wis. 416, 52 N. W. 764; that ordinarily the velocity for passage of water through flumes or bulkheads to be used for power is two feet per second, and the drawing at any greater velocity causes undue waste by reducing the head. There was no such adverse, exclusive, or uninterrupted user of water by the defendant under the Woodward grant as is necessary for a basis of limitation or prescription and no estoppel *in pais.* Respecting the grant of December 29, 1879, now owned by defendant, the court found that the original deed from West to Fleming specified, in addition to the land, the thing granted as follows:

"Together with the right to draw from the canal and use for hydraulic purposes on the aforesaid tract of land so much water as not to exceed in all 200 horse power."

This deed contained a clause of warranty, however, as follows:

"Warranting among other things that the above bargained premises with 200 horse power net of water power as above granted to be used for hydraulic purposes on said premises in

the quiet and peaceable possession of said party of the second part, his heirs and assigns, he will forever warrant and defend."

Title to this lot and this 200 horse power of water power came to defendant through warranty deeds, in each of which the thing granted was described as 200 horse power, but no words indicating whether the power granted was available or theoretical horse power.

The circuit court made other findings of fact, a synopsis of which is here presented and grouped together because they relate to a separate conclusion of law to the effect that the parties to this action were, as to the said Woodward grant of August 27, 1864, concluded by the judgment of this court and the judgment of the circuit court pursuant to the mandate of this court in a certain action entitled *Valley Pulp & Paper Co. v. West,* reported in 58 Wis. on p. 599 (17 N. W. 554). Such findings are also relevant to a construction of the grant of April 27, 1864, treating such construction as an open question. That case was decided in this court on November 20, 1883, and the plaintiff claims under West, who was a party to that action, by its grant of the residue dated June 18, 1887. It also claims and holds under the grant of 3,000 square inches made April 5, 1870, by West to the Appleton Iron Company. As to this last, West had parted with his title long prior to the rendition of the judgment relied upon as an estoppel. The owner of that interest was not a party to the action in which such judgment was rendered, and the plaintiff is therefore in the possession of, holding, and owning its residuary title through a conveyance from one of the parties to that action after judgment therein, and its title to 3,000 inches of water under and through another person not a party to said action nor estopped by said judgment. The defendant holds the Woodward grant under or through the Valley Pulp & Paper Company, plaintiff in the action mentioned, and its other grants by mesne conveyances under West, who

parted with his title thereunto prior to the judgment in question. The Woodward grant was of a tract of land on and including fifteen feet of said bulkhead, together with "the privilege of drawing from said bulkhead so much water as said Woodward, his heirs or assigns, may need for whatever machinery may be erected on said premises." Prior to 1880 no machinery had been erected on this Woodward lot and no water drawn under the grant last mentioned. In 1880 the Valley Pulp & Paper Company began to build a pulp and paper mill on said lot with machinery therein to be run by water drawn under said grant. To that end it placed in said fifteen feet of bulkhead a flume fourteen feet in the clear for drawing water through said bulkhead to run said machinery, and placed the bottom of said flume even with the ordinary bottom of the opening in the bulkhead. This mill was completed in 1881, and the machinery then in the mill required over 445 horse power theoretical for its operation. This suit of the *Valley Pulp & Paper Co. v. West* was brought in the circuit court for Outagamie county in 1880 to restrain West from diverting the water of the mill-pond from a point near this fifteen feet of bulkhead to a point below or down stream from the Woodward lot. The plaintiff claimed it had the right by said Woodward grant to draw through said flume all the water needed to run said machinery erected or in process of erection on said Woodward lot, and that the threatened diversion would impair that right. West claimed that only such volume of water could be drawn through said flume as could have been drawn through the openings of about nine feet in said fifteen feet of bulkhead as these openings were at the time of the Woodward grant, and at a velocity of not more than two feet per second. After the decision in this court and on June 3, 1885, West conveyed to the defendant a strip of land lying along the north side of the Woodward lot six feet wide and another strip of land on the west side of said lot, and in this deed recited the decision of this court

above referred to, "where the legitimate rights of the parties in suit are clearly defined." Since the defendant received the last mentioned grant the flume has not been increased in width nor has its bottom been made lower. Its walls consist of three-inch plank fastened to uprights twelve inches square. The present opening for drawing water is thirteen feet six inches wide, wholly within said fifteen feet of bulkhead. Part of the timbers supporting the walls of the flume extend about sixteen inches outside of said fifteen feet. The defendant and its grantor have been since 1881 drawing through said flume water needed to run the machinery erected on said Woodward lot during such time in each year as the flow of the river appurtenant to the West power was sufficient to operate all the mills on this power, discontinuing such use when the water was not so sufficient. The machinery now erected on the Woodward lot requires 492 horse power theoretical to operate it efficiently at a head of 9.5 feet, and to produce said power requires the drawing through the said flume at said head of 29,412 cubic feet of water per minute. It was an undisputed fact in the action of the *Valley Pulp & Paper Co. v. West* that water was at the time of the trial of said action being drawn through said flume to run the machinery on said Woodward lot at a velocity of four and two-thirds feet per second. The size of this Woodward lot by length of boundary lines was 150 feet, 128 feet, 150 feet, 136 feet. The court found as conclusions of law:

"I. Whenever the flow of Fox river appurtenant to said West water power is insufficient to fill all said grants of said West prior to said grant of the remainder, to the extent that water is being drawn under and within them, the present owners of said grants are entitled to draw water to fill their grants, at said normal heads, while the works are of capacity to maintain said normal heads, in the order of their priority of date.

"II. Defendant has right to draw under said Woodward grant, through its flume in said 15 feet of bulkhead conveyed

by said grant, as much water as it needs for the machinery on said Woodward lot, at all times when the flow of said river appurtenant to said West water power is sufficient to furnish such volume and 13,180 cubic feet of water per minute, or so much thereof as is being used, due said grants prior to the Woodward grant. Defendant has right to thus draw, at said head of 9.5 feet, while it is practicable to maintain such head, 29,412 cubic feet of water per minute, and may draw it at such velocity as is needed to run said machinery.

"III. Since to narrow said flume by the distance that part of the timbers of its walls are outside of the 15 feet of bulkhead conveyed by said Woodward grant, would increase the velocity of the volume of water needed to run the machinery on said Woodward lot and so increase such volume, and in view of the long use of said flume at its present or a greater width, it need not be thus narrowed.

"IV. Defendant's rights under said Woodward grant as herein stated are determined, for the parties hereto, by said decision of the supreme court in said action of *Valley Pulp & Paper Co. v. West* and by the said final judgment in said action.

"V. Defendant has a right to draw, at said head of 9.5 feet, to fill its said grants of 1,000 inches of water, 30 horse power and 75 horse power, respectively 8,850, 2,230 and 5,575 cubic feet of water per minute, to run machinery on the lots, respectively, conveyed with said respective grants, whenever the flow of said river appurtenant to said West water power unused under prior grants of said West is sufficient to furnish said volumes, while it is practicable to maintain said head.

"VI. Defendant can only draw water as aforesaid under said Woodward grant and said grants of 1,000 inches of water, 30 horse power and 75 horse power, to run machinery on the respective lots conveyed by the deeds wherein said grants were respectively made; and it must be enjoined from otherwise drawing water under said grants.

"VII. The owner of each of said grants of West of horse power or inches of water to be filled by water drawn from the pond of said West water power, which specifies no head and was made prior to said increase of head, in 1876, is entitled to use, at the increased head, the volume of water due such grant at the head before such increase.

"VIII. Plaintiff has right to draw 31,702 cubic feet of water per minute or any part thereof under its said grant of 3,000 square inches of water to run its paper mill, whenever the flow of said river appurtenant to said West water power, and unused under prior grants by said West which require a volume of 60,567 cubic feet of water per minute to fill them at said normal heads, is sufficient to furnish said 31,702 cubic feet per minute or any part of it. Plaintiff must be enjoined from drawing water under said grant of 3,000 square inches of water, in excess of its said right.

"IX. Defendant has right to draw at said head of 10.4 feet, while the works are of capacity to maintain such normal heads, 33,000 cubic feet of water per minute under its said grants of 250 and 400 horse power, theoretical, and 5,077 cubic feet of water per minute under its said grant of 100 horse power, theoretical, to operate its said paper mill, whenever the flow of said river appurtenant to said West water power and unused under prior grants by said West is sufficient to furnish said volumes respectively. Said prior grants prior to said grants of 250 and 400 horse power require a volume of 96,541 cubic feet of water per minute at said normal heads, and those prior to said grant of 100 horse power exclusive of said grants of 250 and 400 horse power, require a volume of 99,320 cubic feet of water per minute at said normal heads, to fill them. Defendant must be enjoined from drawing water under its said grants of 250, 400, and 100 horse power in excess of its said rights.

"X. Plaintiff has right to draw under its said grant of the remainder only the excess of the flow of said river appurtenant to said West water power over that used under and within all grants prior thereto by said West, which prior grants require to fill them a volume of 137,397 cubic feet of water per minute at said normal heads. Plaintiff must be enjoined from drawing water under said grant of the remainder in excess of its said right.

"XI. Said present owners of right to draw water under grants from said West have right, according to the priority of their grants, to have the level of said pond kept substantially as high as the tops of said flashboards, to maintain said normal heads for their use, so far as the flow of said river appurtenant to said West water power is sufficient to keep it at such

level. When said level falls below such height, said owners should suspend drawing water under their grants, in the inverse order of the dates of their grants, sufficiently to maintain said level and heads."

For the plaintiff there was a brief by *Hooper & Hooper,* a separate brief by *Jones & Schubring,* and oral argument by *Moses Hooper* and *B. W. Jones.* They argued, *inter alia:* (1) The former adjudication was not conclusive upon plaintiff. (2) The language of the grant under which defendant claims does not justify drawing with wasteful velocity. *Appleton P. & P. Co. v. Kimberly & C. Co.* 100 Wis. 195, 197, 75 N. W. 889; *Schuylkill N. Co. v. Moore,* 2 Whart. (Pa.) 477; *Doan v. Metcalf,* 46 Iowa, 120; *Loverin v. Walker,* 44 N. H. 489; *Covel v. Hart,* 56 Me. 518; *Dexter S. P. & P. Co. v. Frontenac P. Co.* 20 Misc. 442, 46 N. Y. Supp. 363, 371; *Furner v. Seabury,* 135 N. Y. 50, 31 N. E. 1004; *Oregon I. Co. v. Trullinger,* 2 Oreg. 311; *S. C.* 3 Oreg. 1; *Fogus v. Ward,* 10 Nev. 269. (3) The statute of limitations does not apply to such a case as this. *Cedar Lake H. Co. v. Cedar Creek H. Co.* 79 Wis. 297, 48 N. W. 371; *Ramsdale v. Foote,* 55 Wis. 557, 13 N. W. 557; *Gilman v. S. & F. du L. R. Co.* 40 Wis. 653; *McGowan v. M. P. R. Co.* 23 Mo. App. 203; *Colrick v. Swinburne,* 105 N. Y. 503, 12 N. E. 427; *Reed v. State,* 108 N. Y. 407, 15 N. E. 735; *Wright v. Syracuse R. Co.* 49 Hun, 445, 3 N. Y. Supp. 480, affirmed 124 N. Y. 668, 27 N. E. 854; *Williams v. Allison,* 33 Iowa, 278; *Reihl v. Likowski,* 33 Kan. 515, 6 Pac. 886; *Vail v. Mix,* 74 Ill. 127; *Coe v. Wolcottville Mfg. Co.* 35 Conn. 175; *Carlisle v. Cooper,* 19 N. J. Eq. 256; *Tootle v. Clifton,* 22 Ohio St. 247. (4) The plea of adverse possession does not avail, since the use complained of is in excess of the grant; moreover, there has been no continuity of user; and the proofs show the use to have been permissive and not adverse. (5) Grants of water to run machinery on one lot do not authorize its use on another lot. *Valley P. & P. Co.*

v. West, 58 Wis. 599, 612, 17 N. W. 554; *Minn. M. Co. v. Hobart,* 26 Minn. 37; *Groat v. Moak,* 94 N. Y. 115, 126; *Washabaugh v. Oyster,* 18 Pa. St. 497; Gould, Waters, §§ 318*a*, 320; 3 Farnham, Waters, 2286.

Geo. G. Greene, for the defendant, contended that the decision in *Valley P. & P. Co. v. West,* 58 Wis. 599, 17 N. W. 554, was conclusive on plaintiff; that every grant of a right or privilege carries with it, by necessary implication, everything necessary to its enjoyment which the grantor has it in his power to grant (*Stanwood v. Kimball,* 13 Met. 526; *Benedict v. Barling,* 79 Wis. 551, 48 N. W. 670; *Galloway v. Bonesteel,* 65 Wis. 79, 26 N. W. 262; *Gray v. Saco W. P. Co.* 85 Me. 526, 530, 27 Atl. 455; *Cummings v. Parker,* 61 N. H. 516); that defendant's rights were protected by the rule of *stare decisis* as effectively as by that of *res adjudicata* (*Van Valkenburgh v. Milwaukee,* 43 Wis. 574; *Pittelkow v. Milwaukee,* 94 Wis. 651, 655, 69 N. W. 803; *Cawley v. La Crosse City R. Co.* 106 Wis. 239, 82 N. W. 197; *Bibb v. Bibb,* 79 Ala. 437; *Bright v. Esterley,* 199 Pa. St. 88, 48 Atl. 810; *Johnson's Adm'r v. Citizens Bank,* 83 Va. 63, 1 S. E. 705; *Minnesota Co. v. National Co.* 3 Wall. 332; *Shore v. Stevens,* 61 Ind. 441); that neither a limitation of velocity to two feet per second, nor a limitation of the width of the flume to eight feet, can be added to the limitations of the West decision; that plaintiff's cause of action is barred by laches and by limitation; that so far as defendant's use exceeded its grant, it could hold by prescription; that defendant's grant of 200 horse power net was of 250 horse power theoretical (*Harrington v. Smith,* 138 Mass. 92; *C., M. & St. P. R. Co. v. Wright L. Co.* 123 Wis. 46, 100 N. W. 1034; *Jacobs v. Spalding,* 71 Wis. 177, 36 N. W. 608; 17 Am. & Eng. Ency. of Law, 2d ed. 7); that defendant is not confined to the use of water for machinery on the lot described in its grant (*Appleton P. & P. Co. v. Kimberly & C. Co.* 100 Wis. 195, 75 N. W. 889; *Doan v. Metcalf,* 46 Iowa, 120; *Cromwell v. Selden,* 3 N. Y.

253; *Olmsted v. Loomis,* 9 N. Y. 423; *Hall v. Sterling I. & R. Co.* 148 N. Y. 432, 42 N. E. 1056; *Albee v. Huntley,* 56 Vt. 454; *Johnston v. Hyde,* 33 N. J. Eq. 632; *Fowler v. Kent,* 71 N. H. 388, 52 Atl. 554; *Hartford W. Co. v. Bugbee,* 76 Vt. 61, 52 Atl. 554; *Tallon v. Hoboken,* 59 N. J. Law, 383, 36 Atl. 693; *King v. Ackroyd,* 28 Colo. 488, 66 Pac. 906; *Hague v. Nephi I. Co.* 16 Utah, 421, 52 Pac. 765; Gould, Waters, § 320; *Lorain v. Walker,* 44 N. H. 201); and that plaintiff's grant of 3,000 inches of water was of practical, not theoretical, inches (*Jackson M. Co. v. Chandos,* 82 Wis. 444, 52 N. W. 759; *Janesville C. Mills v. Ford,* 82 Wis. 416, 52 N. W. 764).

TIMLIN, J. The plea in abatement was disposed of by the decision of this court in *Telulah P. Co. v. Patten P. Co.* 132 Wis. 425, 112 N. W. 522. The defendant interposed a plea of the statute of limitations and adverse possession, but also interposed its counterclaim, which presented for investigation and adjudication questions so interrelated with plaintiff's claims under its several grants as to open up the whole subject for equitable consideration and decision. Besides, the wrong asserted by the plaintiff was continuing or constantly recurring. *Cedar Lake H. Co. v. Cedar Creek H. Co.* 79 Wis. 297, 48 N. W. 371; *Schuster v. Milwaukee E. R. & L. Co.* 142 Wis. 578, 126 N. W. 26; *Ramsdale v. Foote,* 55 Wis. 557, 13 N. W. 557; *Gilman v. S. & F. du L. R. Co.* 40 Wis. 653; *Colrick v. Swinburne,* 105 N. Y. 503, 12 N. E. 427; *Reed v. State,* 108 N. Y. 407, 15 N. E. 735.

The gist of plaintiff's action is that the defendant draws from the passing water from day to day for its use more water than it is entitled to under the terms of its prior grant, thus diminishing the quantity to which plaintiff is entitled from day to day. Actions to recover damages thereby caused which accrued more than the specified number of years before the commencement of such action, actions to recover damages

for or to prevent the wrongful diversion of a watercourse, or actions to recover damages for or to restrain the taking of land by flowing it, and other kindred cases, would doubtless be barred after the like lapse of time. This is a case where both parties were using the water as of right, and the injury consists in one continuing from day to day to use more than his proper share of that which the forces of nature were engaged in consigning to the parties and other riparians and daily delivering along the accustomed channel. Each party used only the water for this particular purpose as it flowed by, and the volume was at times so great that the utmost use by either did not exceed his right and again so small that his use did encroach upon and impair the right of the other. No statute of limitations or of adverse possession, therefore, bars the plaintiff's action, and upon the question of laches each seeks affirmative relief and honors are quite even between the parties.

With reference to its grant of the residue from West, the plaintiff is in privity with its grantor, and, deriving its title through or under West, is bound by the decree in *Valley P. & P. Co. v. West,* reported in 58 Wis. 599 (17 N. W. 554). This is too elementary to require citation of authority. But plaintiff's grant of April 5, 1870, rests upon a different basis. West had made this grant prior to the litigation which resulted in the decree above mentioned, and his grantee, the then owner, was not a party to that suit. The plaintiff became the owner under this grant on June 9th, and under the grant of the residue on June 18, 1887, and West at no time since he parted with this interest to the Appleton Iron Company had any title or ownership therein. However physically connected or commingled in use at plaintiff's mill the avails of these grants are, the grants themselves are separate and distinct in law. The property involved in the litigation between the *Valley P. & P. Co. v. West* did not include that of the Appleton Iron Company under the grant of April 5,

1870. In judgments or decrees which do not determine status, but relate to the rights or interests of parties in and to certain property, privies are those who succeed to the ownership of that property or some right or interest therein under one of the parties to the litigation, directly or by mesne conveyances, by gift, by kinship, or by operation of law. Privity in such cases has reference to persons in their relation to property. *Hart v. Moulton,* 104 Wis. 349, 80 N. W. 599; *Grunert v. Spalding* (on rehearing), 104 Wis. 193, 205, 80 N. W. 589; *Dull v. Blackman,* 169 U. S. 243, 18 Sup. Ct. 333; *Whitney v. Brunette,* 15 Wis. 61. Hence the plaintiff as to its grant of April 5, 1870, in the foregoing schedule is not estopped or conclusively bound by the decree or decision mentioned. It has the ordinary right of any suitor to challenge the correctness of the decision of this court in the case referred to and to relitigate the matters determined by the circuit court in that litigation, to which no one of its predecessors in title was a party or privy.

It is found by the trial court and conceded by counsel on both sides of this controversy that the highest efficiency or greatest power can be obtained from any given volume of water at a stated head by taking that water through the bulkhead or flume to the wheel at a velocity of two feet per second. Within limits, an increase of velocity through a given aperture carries a greater volume and actually produces more power, but less power in proportion to the volume of water used. The effect of this increased velocity is to reduce the head and thus render the water used less effective. In the grant of August 27, 1864, West to Woodward, there was this language: "Said premises embracing fifteen feet of the south end of the bulkhead, together with the privilege of drawing from said bulkhead as much water as said Woodward, his heirs or assigns, may need for whatever machinery may be erected on said premises." Omitting extrinsic circumstances, two limitations are noticeable, viz.: the south fifteen feet of

the bulkhead, indicating that water must be drawn through an opening of this width, less such supports or sides as would be necessary and proper for that purpose, at the same time leaving the bulkhead its due support. The other is that so much water may be drawn as Woodward or his assigns may need for whatever machinery may be erected on said premises. The appellant seeks by construction to add to this, viz.: "the water shall not be drawn at a greater velocity than two feet per second." Machinery has been for a long time erected and in use on said lot, which machinery requires to operate it efficiently 492 theoretical horse power, and to produce such power requires 29,412 cubic feet of water per minute to be drawn through the flume. This quantity in this time could only be drawn through by a velocity much exceeding two feet per second, and if the velocity were reduced to two feet per second the defendant would, through this opening, have only about one third of the power needed for the machinery erected on said lot. If the defendant would remove its machinery and reduce its mill so that it would require about 123 horse power to operate it and put in wheels accordingly, the water would be drawn to the wheels at the rate of two feet per second, but the present velocity is the product of and caused by the magnitude or extent of the power needed to drive the machinery on said lot. No doubt if the size of opening only was given and the volume of water not otherwise fixed by the terms of the grant, water should be taken at its most efficient velocity under the rule of *Appleton P. & P. Co. v. Kimberly & C. Co.* 100 Wis. 195, 75 N. W. 889. But we have an express measure of the quantity of water to be taken, not referring to a yard stick of very accurate length, it is true, but nevertheless expressly referring to it. In such case it is the office or function of interpretation to ascertain and declare only that which is doubtful. In order to derive from this contract an implication that the velocity must be that most efficient, we must contradict the measure stated in the grant

or ignore it as if it did not exist. The head being known, to hold that the size of the opening is fixed by the grant, as I think we must, and at the same time that a velocity of two feet per second is implied, would be to fix the quantity of water and the resultant horse power with great certainty, to be sure, but would also be to measure the extent of the grant by a different measure than that specified in the written instrument by the parties thereto. This cannot be done. Definite provisions cannot be ignored or overborne and eliminated by implications of this kind which control more general grants to whose terms they are not contradictory. We cannot at this late day consider this grant grossly improvident or made with a view to more ancient conditions of manufacturing or machinery and without knowledge of the power which might be necessary to drive the machinery of a pulp mill. In the litigation mentioned between the parties to the original grant West made no such claim.

The defendant is now drawing water through an aperture of thirteen feet six inches in the south fifteen feet of said bulkhead, the remainder of the fifteen feet being taken up with the side walls or supports of the flume and opening in the bulkhead, but part of the timbers supporting these walls extend about sixteen inches outside of or beyond said fifteen feet, not, however, on the property of the plaintiff. The bottom of said opening is as it was at the time of the Woodward grant and where it has remained since. To narrow this opening to less than thirteen feet six inches would merely increase the velocity with which the water is taken, reduce still more the head, and require a greater volume of water to operate the machinery now on the Woodward lot. An opening of thirteen feet six inches is, we think, within the terms of the grant, and there is no equitable ground upon which the plaintiff can narrow the opening on account of the projection of the side timbers, which projection affects it not in the least. Treating the question as a new one, we should construe this grant as aforesaid. But the case of *Valley P. & P. Co. v. West,*

58 Wis. 599, 17 N. W. 554, is, under the rule of *stare decisis,* also a very potent authority in favor of such construction, and the construction put upon this grant by the parties thereunto after that decision and in that litigation and the long acquiescence of such original parties and of the plaintiff and defendant herein in that construction tend still further to support this view. The grant appears to have been loosely worded, but the defendant is not entitled to use any water under it except what is needed for the purpose of driving machinery on the said lot, and of course in a reasonable manner. We do not wish to be understood as deciding that the defendant, after having erected machinery on the Woodward lot requiring for its operation the specified horse power, could increase the volume of water to which it is entitled under this Woodward grant by thereafter erecting machinery on said lot requiring a greater horse power. This question was not argued and is not decided. See, however, Gould, Waters (3d ed.) § 318*a; Groat v. Moak,* 94 N. Y. 115; *Galloway v. Wilder,* 26 Mich. 97. All the other questions relative to the construction of the Woodward grant presented in this case were, we think, before this court in the case of *Valley P. & P. Co. v. West, supra,* including the velocity with which water was then being drawn through the bulkhead, which much exceeded two feet per second. But it was not proven in that case that at a stated head a given volume of water attains its maximum efficiency when drawn at the rate of two feet per second, nor that its power-producing efficiency under presently known mechanical appliances per volume diminishes when this velocity is increased, and the same arguments as are presented here were not then made. Nevertheless we believe the Woodward grant was properly construed in that case, and we discover no act of the defendant in violation of the Woodward grant as there construed. This makes it unnecessary to consider the question of estoppel which was argued.

The grant of December 29, 1879, from West to Fleming

was of "the right to draw from the canal and use for hydraulic purposes on the aforesaid tract of land so much water as not to exceed in all 200 horse power." In the same instrument was a covenant of warranty of quiet enjoyment and of title which described the thing granted as "200 horse power net." The defendant by mesne conveyances, none of which used the word "net," became the owner of this right. The circuit court held that this conveyed 200 available or practical horse power, equal to 250 horse power theoretical, and a majority of this court (not including the writer) agrees with such construction, upon the ground that the word "net" must be given some force, and its most appropriate office in this instrument is to designate actual or available horse power; and on the further ground that the words "horse power" in the granting clause of the instrument are ambiguous as meaning either available or theoretical horse power, and this word "net," in another part of the same instrument, may be taken to show the intention of the parties to grant available horse power.

The defendant's appeal is only from those portions of the judgment which determine (1) that defendant can under its grant of 1,000 inches of September 5, 1864, and its grant of seventy-five horse power of April 15, 1869, only use the water for driving machinery on the lots conveyed with such grants, and (2) that plaintiff can draw 31,702 cubic feet of water per minute under its grant of April 5, 1870, of 3,000 inches of water. The grant of September 5, 1864, was of a described parcel of land, "together with the right of taking so much water not exceeding 1,000 inches as" grantee "may need for any machinery which he or his assigns may erect on" the lot. That of April 15, 1869, the same, except the maximum is fixed at seventy-five horse power and the word "assigns" is omitted. Doubtless if we were convinced that "machinery which he (or his assigns) may erect on the lot" was used merely to measure the quantity conveyed, we would feel inclined to follow the cases of *Johnston v. Hyde,* 33 N.

J. Eq. 632; *Fowler v. Kent,* 71 N. H. 388, 52 Atl. 554; and *Hartford W. Co. v. Bugbee,* 76 Vt. 61, 56 Atl. 344. But the quantity was otherwise limited by express words of the grant. Or if the grant was merely of a certain quantity of water, we would be advised by the rule in *Luttrel's Case,* 2 Coke (Part IV) 86, cited in *Johnston v. Hyde, supra.* We have been cited to no case directly in point and have found none. But a *dictum* in *Valley P. & P. Co. v. West,* 58 Wis. 599, 17 N. W. 554, is in point. The language of the Woodward grant is similar, but in that grant there is no express limitation of volume or power by inches or horse power. It is in any view a question of intention of the parties to the original grants by West. Whether the public has a greater interest in having one large or several small factories seems a rather fanciful test of what the original parties to the grants intended. Deducing their intention from the language employed, it seems that the words "need for any machinery which he may erect upon the lot" indicate a design to grant the water for use to drive machinery only upon the designated lot. This might be of considerable advantage to the grantor in various ways, such as advancing in value his other adjacent lots, permitting him a larger residue by reason of inability or unwillingness to erect machinery on that lot, or in case of suspension of operations thereon, etc. We are satisfied that the learned circuit court construed these grants correctly, and the grantee must be limited to the use of the water upon the designated lot.

With reference to the findings of fact that in all said grants inches of water meant theoretical inches and horse power theoretical horse power, we find them supported by evidence and cannot undertake to reverse or change these findings. Upon this basis, the computation of the volume of water which plaintiff is entitled to draw at a head of ten feet, it is conceded, was correctly made and amounts to 31,702 cubic feet per minute.

It seems unnecessary to mention other matters. The conclusions of law of the circuit court, except as above modified, are all approved, and the judgment must be affirmed.

By the Court.—Judgment affirmed. Attorneys' fees offset. No printing to be taxed, or other disbursement. Plaintiff to pay clerk's fees.

KERWIN, J., took no part.

CITY OF MARINETTE and another, Respondents, vs. GOODRICH TRANSIT COMPANY, Appellant.

March 11—April 8, 1913.

Bridges: Collision: Negligence: Liability for injury to bridge: Contributory negligence: Absence of lights prescribed by federal authorities: Questions for jury: Special verdict: Form and sufficiency: Positive and negative testimony.

1. If the failure to maintain upon a bridge over a navigable river the lights prescribed by the federal lighthouse board did not and could not contribute to cause a collision between a vessel and such bridge, such failure will not defeat a recovery of damages for the injury to the bridge.
2. Even though it appeared that the prescribed lights were better than those maintained on the bridge, yet evidence tending to show that the steamboat ran into the bridge without giving any signal; that the captain had notice, in time to have avoided the collision, that the bridge was not open; and that in fact he had all the notice and knowledge that he would have had if the lights required by the lighthouse board had been maintained, was sufficient to warrant the jury in finding that the absence of the prescribed lights did not and could not have contributed to the collision.
3. A finding in the special verdict in such case that no want of ordinary care on the part of the plaintiffs (the cities maintaining the bridge) contributed proximately to the collision, is *held* sufficient, the jury having been instructed that they could not so find unless satisfied to a reasonable certainty

from the evidence that the absence of the prescribed lights could not in any way have contributed to the injury and no objection having been made to the form of the verdict.

4. Testimony of a bridge tender, who was on the bridge and whose duty it was to watch boats going up and down the river and to listen for the blowing of whistles, that he watched the steamboat in question coming in and listened for a signal from it; that his mind was on the whistle and he was waiting to hear it; but that no whistle was blown, was not merely negative testimony and was sufficient, as against the testimony of a number of witnesses to the contrary, to raise a jury question as to whether or not the whistle was blown.

APPEAL from a judgment of the circuit court for Marinette county: S. D. HASTINGS, Circuit Judge. *Affirmed.*

The city of *Menominee* in the state of Michigan, and the city of *Marinette* in the state of Wisconsin, plaintiffs, maintained the bridge in question across the Menominee river between the said cities. On the morning of July 18, 1907, at about 2:30 a. m., the steamer Carolina, owned by the defendant, collided with the bridge in question, damaging it to the extent of $3,250. There is no dispute as to the amount of the damages, and this action is brought for the recovery thereof.

The negligence charged in the complaint is in substance that the defendant failed to give warning of the approach of the steamer which collided with the bridge so that the bridge might be opened for the steamer to pass through, and that the said steamer was so negligently and carelessly managed as to run into the bridge and cause the damage complained of.

The defendant answered admitting certain allegations of the complaint and denying the material allegation respecting negligence of defendant, and also set up as a separate defense failure on the part of the plaintiffs to comply with the rules of the United States lighthouse board passed in pursuance of an act of Congress relating to lighting bridges over navigable rivers, and providing that all parties owning, occupying, or operating bridges over any navigable river shall

maintain at their own expense from sunset to sunrise throughout the year such lights on their bridges as may be required by the lighthouse board for the security of navigation; and in addition thereto all parties owning, occupying, or operating any bridge over any navigable river shall in any event maintain all lights on their bridge that may be necessary for the security of navigation. And the answer further alleged not only failure to comply with the rules of the lighthouse board, but also failure to maintain any proper lights on said bridge.

Motions for nonsuit and directed verdict in favor of the defendant were denied, and the jury returned the following verdict:

"(1) Were three blasts of the whistle on the Carolina blown in the usual place for signaling its approach to and intent to go through the bridge? *A.* No.

"(2) Were the red lights on top of the center of the draw, and the two lights at its end on the east side, usually maintained by the plaintiffs, burning at the time the Carolina struck the bridge? *A.* Yes.

"(3) Was the defendant negligent in so running the Carolina as to permit her to strike the bridge? *A.* Yes.

"(4) If your answer to the third question should be 'Yes,' then answer this: Was said negligence a proximate cause of the collision with and injury to the bridge? *A.* Yes.

"(5) If your answer to the third and fourth questions should be 'Yes,' then answer this: Did any want of ordinary care on the part of the plaintiffs contribute proximately to the collision with and injury to the bridge? *A.* No."

The usual motions were made after verdict for change of answers in the special verdict and for new trial, which were denied, and judgment rendered in favor of the plaintiffs, from which this appeal was taken.

Charles E. Kremer and *H. L. Frink,* for the appellant.

For the respondents there was a brief by *L. D. Eastman* and *John O. Miller,* and oral argument by *Mr. Eastman.*

KERWIN, J. 1. It is first insisted by counsel for appellant that the court below erred in overruling defendant's motion for nonsuit made at the close of the plaintiffs' evidence. This contention is based mainly upon the proposition that it appeared from the plaintiffs' showing that the rules of the lighthouse board respecting lights to be maintained upon the bridge under authority of act of Congress were not complied with. It is contended that the regulations of the lighthouse board have the force of a federal statute and must be recognized by the court as the law. It is conceded that the lights prescribed by the lighthouse board were not maintained upon the bridge. Under repeated decisions of the federal courts in admiralty cases it has been ruled that where such lights have not been maintained, and a collision occurs, it is incumbent upon the party in default to show that the absence of such lights not only did not but could not have caused the injury. *Smith v. Shakopee,* 103 Fed. 240; *The Pennsylvania,* 19 Wall. 125; *Belden v. Chase,* 150 U. S. 674, 699, 14 Sup. Ct. 264; *The Martello,* 153 U. S. 64, 14 Sup. Ct. 723. These decisions of federal courts arising on questions depending upon acts of Congress are entitled to weight with this court, if not controlling.

The case was tried in the court below upon the law as laid down in the foregoing federal decisions, as appears from the able opinion of the trial judge in the record. As will be seen from the foregoing decisions, the federal courts have quite uniformly held to a strict adherence to the requirements of the law in relation to lights and signals, and that no exception can be made unless, as is said, "the breach of regulations could not have been a contributing cause of the disaster." But if the default in obeying regulations be not a contributing cause, then such default will not defeat recovery. *The Fannie,* 11 Wall. 238.

There is evidence on the part of the plaintiffs tending to show that the captain in charge of the Carolina, at the time

of the collision and for many years prior thereto, was familiar with the harbor and with the lights used on the draw; that lights were exhibited on the bridge at the time of the collision, as usual, sufficient to give warning that the bridge was not open; that at the time of the collision the night was clear, so the bridge could have been seen from the Carolina coming up the river at a distance of from 400 to 500 feet so as to observe whether the bridge was being opened; that the whistle of the Carolina was not blown as a signal to open the bridge at the proper place, and was not blown at all until immediately before the steamer struck the bridge and not in time so that the bridge could have been opened in time to avoid the collision; that the Carolina collided with the bridge and caused the injury. We think the evidence was ample to carry the case to the jury, therefore the motion for a nonsuit was properly overruled.

2. It is contended that the court erred in denying defendant's motion for a directed verdict at the close of all the evidence. In addition to the point that the absence of lights required by the lighthouse board was ground for a nonsuit, counsel for appellant further insist that upon all the evidence a verdict should have been directed for defendant, and an attempt is made to support this contention on two grounds, which will be briefly referred to.

First, it is said that several witnesses testified that the government lights were much better than those maintained on the bridge, and that the evidence shows that the absence of government lights contributed to bringing about the collision. Second, it is insisted that the evidence on the part of appellant establishes beyond controversy that the whistle on the Carolina was blown as a signal for the opening of the bridge, and that this fact is established by the positive evidence of twelve witnesses, while the evidence on the part of the respondents is negative, therefore there was not sufficient evidence upon the point to carry the question to the jury, but

that as matter of law it was established that the whistle was blown.

The first of these propositions as regards government lights we consider the more serious question, but we are convinced that there is sufficient basis in the evidence to warrant the jury in finding that the absence of such lights did not and could not have contributed to the collision.

True, the evidence shows that the government lights were better than those maintained on the bridge; but the evidence also tends to show that the captain in charge of the steamer discovered that the bridge was not open when 200 feet from it, and that he could stop the vessel when going at the rate of two and one-half miles an hour in a distance of 150 feet, and that the steamer was going at the rate of two and one-half miles an hour when within two or three hundred feet of the bridge; that the lookout reported to the captain when about 500 feet from the bridge that it was not open. The mere fact that the government lights were better and would show more plainly the situation is not the important question, but whether the lights maintained upon the bridge, in connection with the captain's knowledge of the situation and the fact that he knew that the bridge was not open in time to have avoided the collision, were sufficient to warrant the jury in finding that the absence of the government lights did not and could not have contributed to the collision. *Blanchard v. New Jersey S. B. Co.* 59 N. Y. 292; *The Wenona,* 19 Wall. 41; *The City of Washington,* 92 U. S. 31.

Under the repeated decisions of this court, if there is any credible evidence which, if undisputed, would entitle the jury to find for the plaintiff, a verdict should not be directed for the defendant.

"The simple question is, whether the evidence in behalf of the plaintiff, had it remained undisputed, and giving it the most favorable construction it will legitimately bear, including all reasonable inferences from it, is sufficient to justify

a verdict in favor of the plaintiff." *Spensley v. Lancashire Ins. Co.* 54 Wis. 433, 11 N. W. 894.

Moreover, we have the decision of the learned trial judge overruling the motion for a directed verdict and passing upon the sufficiency of the evidence. Deference is due to his conclusions involving the sufficiency of the evidence to carry the case to the jury. *Nolan v. Kroening,* 130 Wis. 79, 109 N. W. 963; *Murdock v. B., D. L. & J. R. Co.* 147 Wis. 100, 132 N. W. 979; *McCune v. Badger,* 126 Wis. 186, 105 N. W. 667; *Slam v. L. S. T. & T. R. Co.* 152 Wis. 426, 140 N. W. 30.

A very vigorous contention is made by counsel for appellant to the point that upon the showing made the jury could not find that the absence of government lights on the bridge in accordance with the regulations of the lighthouse board did not and could not contribute to the collision. We cannot agree with counsel in this position. Under the well established rule of this court, we think the evidence in favor of the plaintiffs, giving it the most favorable construction it will legitimately bear, including all reasonable inferences from it, is sufficient to support a verdict for the plaintiffs upon this question.

The jury were entitled to find on the evidence that the Carolina ran into the bridge without giving any signal, and that the captain had notice that the bridge was not open in time to have avoided the collision, and in fact had all the notice and knowledge that he would have had had the lights required by the lighthouse board been on the bridge. Under such circumstances it is clear that the motion to direct a verdict for defendant was properly overruled. *Wis. F. L. Co. v. Bullard,* 119 Wis. 320, 96 N. W. 833; *Goldman v. Fidelity & D. Co.* 125 Wis. 390, 104 N. W. 80; *Lam Yee v. State,* 132 Wis. 527, 112 N. W. 425; *Ellison v. C. & N. W. R. Co.* 143 Wis. 603, 128 N. W. 428; *Kersten v. Weichman,* 135 Wis. 1, 114 N. W. 499; *Zentner v. Oshkosh G. L. Co.* 126 Wis. 196, 105 N. W. 911.

It is further insisted by counsel for appellant that there is no credible evidence before this court sustaining the proposition that the whistle was not blown. Upon this point we think counsel is in error, and we need not repeat the rule of this court before stated on the question of sufficiency of the evidence to carry the case to the jury. The contention of appellant under this head is that respondents' testimony is negative merely, therefore not sufficient to raise a jury question. True, a large number of witnesses who were in position to know testified positively that the whistle was blown, and there is considerable testimony negative in its character on the part of the respondents to the effect that the whistle did not blow. However, there is some testimony on the part of the respondents that cannot be regarded as negative testimony. Edward Berg, who was bridge tender on the night in question, and whose duty it was to watch boats going up and down the river and listen for the blowing of whistles and attend to the lights on the bridge, testified that he was expecting the Carolina in that night, and saw it in the bay just outside the lighthouse and watched it coming in; that he was watching for the whistle, watching for a signal from the Carolina, and watched it until it came up to the bridge and ran into it, and did not hear the boat blow any whistle. He further testified that he never thought the boat was going through the draw, because no whistle was blown.

"I can't tell how fast he was going, as my mind was on the whistle. I was waiting to hear the whistle. . . . If he had been going fast I don't think it would have made any impression in my mind, as my mind was on the whistle. I did not release the lever and unlock the bridge because he did not blow for it, and I did not know he wanted the bridge open until he hit it."

The testimony of Berg, under the well established doctrine of this court, was sufficient to raise a jury question as to whether or not the whistle was blown. *Urbanek v. C., M. & St. P. R. Co.* 47 Wis. 59, 65, 1 N. W. 464; *Joannes v. Mil-*

lerd, 90 Wis. 68, 62 N. W. 916. The evidence of Berg on the question referred to, though negative in form, was really affirmative in essence. *Joannes v. Millerd, supra; Urbanek v. C., M. & St. P. R. Co., supra; Sobey v. Thomas,* 39 Wis. 317; *Shekey v. Eldredge,* 71 Wis. 538, 37 N. W. 820; *Steinhofel v. C., M. & St. P. R. Co.* 92 Wis. 123, 65 N. W. 852; *Brown v. Milwaukee E. R. & L. Co.* 148 Wis. 98, 133 N. W. 589. The case last cited is especially in point on the question now under consideration. The point was whether a gong on a street car was sounded. The plaintiff testified that he was listening for the gong and did not hear it. The motorman testified that he sounded the gong. The question arose on the charge to the jury, and the court held that the evidence was not purely negative, it appearing that there was nothing to interfere with plaintiff's hearing, and that he was in a position where he could have heard the gong if sounded.

We are convinced that the jury were entitled to find from the evidence that the whistle was not blown.

The jury answered the fifth question in the negative, thereby finding that there was no want of ordinary care on the part of the plaintiffs which contributed proximately to the collision with and injury to the bridge. On this question the court below charged the jury, in effect, that the absence of the lights required by the lighthouse board raised a presumption of negligence, and that the law required the jury to find that the plaintiffs were guilty of contributory negligence because they did not have those lights, unless the testimony in the case satisfied the jury that the absence of such lights not only might not but could not in any way have contributed to the collision, and that unless they were satisfied to a reasonable certainty from the evidence that the absence of lights which the law required could not have contributed to the collision, they must answer the fifth question in the affirmative. No objection was made to the form of the verdict and no request made to submit any additional questions, and

no exception was taken to the charge. We are satisfied that the answers to the questions submitted in the special verdict are supported by the evidence, and that no error was committed upon the trial.

By the Court.—The judgment of the court below is affirmed.

HERNING, Administratrix, Respondent, vs. HOLT LUMBER COMPANY, Appellant.

March 11—April 8, 1913.

Master and servant: Death caused by unguarded shafting: Delegation of master's duty: Responsibility of servant: Contributory negligence: Lubricating machinery in motion: Questions for jury: Special verdict: Sufficiency: Damages: Burial expenses.

1. An employer upon whom the statute imposes the duty of securely guarding shafting which is so located as to be dangerous to employees cannot evade such duty, as to a subordinate employee, by a mere direction to him, given through a superintendent or foreman, to assist in erecting or assembling the machinery in question, in the erection or assembling of which other employees superior to him in authority are also engaged at the time.
2. In an action for death of an engineer which resulted from his being caught on an unguarded shaft connected with a stationary engine, the evidence is *held* to sustain a finding by the jury that defendant did not intrust to the decedent the duty of getting the engine and its attachments in proper condition for use.
3. The mere fact that an employee had an opportunity on his own initiative to devise and place a guard upon an exposed shaft is not sufficient to relieve the employer from liability for injury sustained by such employee as a consequence of the shaft being unguarded.
4. A special verdict finding, among other things, that the unguarded shaft by which an employee of defendant was injured was so located as to be dangerous to defendant's employees in the discharge of their duty while using ordinary care, and negativing

contributory negligence, is *held* sufficient, although there was no specific finding of defendant's negligence or of proximate causation.

5. Whether or not the plaintiff's intestate, who was fatally injured as a result of being caught on a revolving shaft connected with a stationary engine which he was engaged in lubricating, was guilty of a want of ordinary care in failing to stop the engine before attempting to apply the lubricant, is *held* in this case to have been a question for the jury.

6. Where defendant's negligence is claimed to have caused fatal injury to plaintiff's intestate and it is sought to recover both the damages accruing to the decedent and those accruing to his surviving parents, burial expenses may be recovered under either cause of action; but when the action is brought for death and for the benefit of relatives who have no duty of interment cast upon them by law, that item of damages should not be included in an award under the death statute.

APPEAL from a judgment of the circuit court for Marinette county: E. B. BELDEN, Judge. *Affirmed.*

For the appellant there was a brief by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

Pierre Martineau, for the respondent.

TIMLIN, J. The complaint in this cause averred that plaintiff's decedent, John Herning, on August 1, 1910, while in the employment of defendant and engaged in performing the duties of such employment, came to his death in consequence of being caught on a revolving shaft so located as to be dangerous to the employees of defendant in the discharge of their duties; that the defendant negligently permitted this shaft to be unguarded and unfenced. One count of the complaint sought to recover damages accruing to the decedent and another damages accruing to his surviving father and mother, a combination which is permissible under our statutes. The jury awarded under the first count above referred to (being the second count of the complaint) $1,227, which included an item of $107 for burial expenses, and under the second count $2,500.

Special Verdict.

"(1) Did the defendant, the *Holt Lumber Company,* intrust to John Herning the duty of getting the engine and its attachments in proper condition for use at Townsend? *A.* No.

"(2) Had the defendant the right, in the exercise of ordinary care, to believe that John Herning would properly guard the shaft before operating the engine? *A.* No.

"(3) Was the shaft by which John Herning was injured so located as to be dangerous to defendant's employees in the discharge of their duty while using ordinary care? *A.* Yes.

"(4) Did any want of ordinary care on the part of John Herning proximately contribute to his injury and death? *A.* No.

"(5) What sum of money would reasonably compensate John Herning for the damages caused to him by reason of his injury in question? *A.* (a) Pain and suffering, $1,000. (b) Expenses of medical treatment, $120. (c) Burial expenses, $107.

"(6) What sum of money will reasonably compensate the father and mother of John Herning, deceased, for the death of their said son? *A.* $2,500."

Appellant contends that the evidence shows without dispute that the decedent was by his employment charged with the duty of putting the engine in question and its attachments, including the shaft, in proper condition for use, and also had charge and control of the operation of such engine, and upon this hypothesis bases two conclusions of law, either of which, it contends, relieves it from liability, viz.: (1) the decedent having been charged by his employer with and having assumed the duty of putting the engine and its attachments into proper condition, was negligent in not guarding or fencing the shaft if it was so located that the law required it to be fenced or guarded, hence cannot recover; (2) decedent should in the exercise of ordinary care have stopped the engine before attempting to lubricate the bearings of the shaft in question.

Without conceding the legal accuracy of the first conclu-

sion, it is manifest that no such question arises if the first answer of the special verdict is supported by evidence. W. A. Holt, the vice-president and manager of defendant, gave directions to one Ferguson, foreman of one of defendant's mills and a mechanic, to erect a hoist for handling logs at Townsend, using machinery for that purpose which defendant had on hand at another place. Part of this hoist consisted of a portable steam engine and boiler so constructed that the engine, driving shaft, and fly-wheels were fastened on top of the boiler, and this outfit was brought from Ontonagon to Oconto, where one of the fly-wheels was taken off and left, thus leaving the end of the shaft which formerly carried this fly-wheel projecting, exposed, and having a key seat grooved in the side of its projecting end. Holt and Ferguson were at Oconto, and there the latter worked on the outfit under the directions of Holt, and from there the outfit was sent to Townsend to be set up and put in place. But this setting up and putting in place could not change and was not intended to change the relative position of the boiler, engine, and shaft. That was fixed. Ferguson, acting under Holt, also went to Townsend to erect, assemble, or help in the erection and assembling of this machinery, and there was also sent up a millwright or carpenter named McKalson. Subordinate to Holt was Paul McDonald, superintendent of all the logging work on the Oconto river, and this hoisting plant was under his supervision. Under Paul McDonald was a subordinate foreman named Ed Hereld, whose duty it was to look after the job at Townsend and get the hoist ready, and who had charge of the men there to do the loading and putting up the hoist. Paul McDonald employed the decedent and told him to put up the engine and hoist and fit up the engine. He testifies that he looked to Herning for the erection and getting into condition of this engine at Townsend. Mr. Holt testifies that Hereld was foreman at the hoist under McDonald and that he had power to hire and discharge any man in the crew, and

the crew consisted of an engineer, fireman, the men that ran the jammer, men that worked the cars loading, men bucking the logs up the slides and working on the river. True, he also testified that Hereld had never had any authority to hire or discharge an engineer. It is quite manifest that Herning was a subordinate below the rank of superintendent or foreman whom the foreman himself, subordinate to Superintendent Holt, directed to assist in the erection and placing of the machinery. Several others superior to Herning were likewise directed by authority superior to the foreman who directed Herning or of equal rank with such foreman. From this it appears that the answer of the jury to the first question above quoted is well supported by evidence. Certainly Holt, Ferguson, and Paul McDonald were the superiors of Herning, and there is fair room for the inference by the jury that Hereld and McKalson were also such superiors in the matter of assembling, placing, and operating the hoist.

If the defendant corporation could pass the statutory duty of covering this shaft down along the line of its employees until it reached the engine driver, who was told by the subordinate foreman employing him that he should assemble and place the machinery, which under the circumstances in evidence must have meant to aid in the assembling and placing thereof, the statute would soon become a dead letter. Decedent's superior who planned and laid out the work failed to provide a guard for this exposed shaft; so did the next in authority, and the next. The position or location of the shaft with reference to its distance from the floor and its relation to the bearings thereon requiring lubrication could not be changed by the decedent or any one else without an entire reconstruction of the engine, which could only be done in a machine shop. The most that can be said on the evidence is that the plaintiff had the opportunity on his own initiative to devise and place a guard upon the exposed shaft. So ordinarily has any workman. The statute places this duty upon

the employer. He cannot evade it by merely ordering a subordinate employee to erect or assemble the machinery, in the erection or assembling of which the superiors are also engaged at the time. Had a guard been supplied by the employer which the decedent neglected to put in place, a different question might arise. We are satisfied that the answer of the jury to the first question is well supported by evidence and that the first proposition advanced by appellant does not arise in this case. There are also other contentions of appellant hinging upon the theory that it was the duty of decedent, not that of his employer, to cover the shaft in question, all of which must be overruled without extended comment.

The special verdict is substantially similar to that in *Willette v. Rhinelander P. Co.* 145 Wis. 537, 130 N. W. 853, upon which judgment was ordered by this court for the plaintiff provided he consent to a reduction of damages, and such verdict is sufficient.

With reference to the fourth question of the special verdict the case is closer. Decedent could have stopped the engine for the purpose of lubricating the bearings in question. Was he imperatively required to do so in the sense that his omission to take this precaution was negligence in law? On this point the case is somewhat similar to *Koch v. Wis. P. C. Co.* 152 Wis. 488, 140 N. W. 37. There the person injured was an engine driver, had power and authority to shut down the engine, but undertook to oil the bearings while in motion. There the emergency was an order to try some new lubricant which the master desired to experiment with without delay. Here the emergency was the discovery of a hot box. In the former case, instead of shutting down the engine to oil, Koch attempted to oil while the engine was in motion. Here the same thing was done. In *Monahan v. Fairbanks-Morse Mfg. Co.* 147 Wis. 104, 132 N. W. 983, the act of reaching over a shaft in motion for the purpose of filling grease cups was held not to constitute contributory negligence as matter of

law, the plaintiff being unaware of the presence of the exposed set-screw. In *Willette v. Rhinelander P. Co.* 145 Wis. 537, 130 N. W. 853, the plaintiff was injured while oiling machinery so located as to be dangerous to an oiler in the discharge of his duty using ordinary care, while such machinery was in motion. The jury found absence of contributory negligence. The trial court changed that answer so as to find contributory negligence. This court reversed the judgment and permitted the plaintiff to take judgment for a stated amount of damages. See, also, *Klotz v. Power & M. M. Co.* 136 Wis. 107, 116 N. W. 770. In the instant case the engine was not in operation long enough to enable the jury to say that any regular practice obtained with reference to stopping the engine for lubrication or otherwise when the bearings were discovered to be heated from friction. Whether an ordinarily prudent man in decedent's position under the circumstances existing in the instant case would have shut down the engine and stopped work for the purpose of putting the graphite lubricant upon the hot bearing, or would have attempted to apply it as decedent did, was for the jury.

The item of $107, assuming it to be reasonable in amount, for burial expenses, was a charge against the estate of decedent which his administrator must pay out of the assets of the estate. The item of $1,000 for pain and suffering was assets of that estate; and the verdict allows as compensatory damages to that estate in addition the expense of medical attendance and the burial expenses. Sec. 3852, Stats., makes burial expenses a debt of the estate, and it must be paid either out of the $1,000 or out of decedent's other property if he had any. In either case it is direct diminution of his estate caused by the wrongful act of defendant. It is included in the sum awarded under the second count of the complaint and covered by the fifth question of the special verdict. In *Secard v. Rhinelander L. Co.* 147 Wis. 614, 133 N. W. 45, it was held that such outlay was recoverable by a father under

the death statute. It may in such case be recovered under either cause of action, but when the suit is brought for death and for the benefit of such relatives as have no duty of interment cast upon them by law, this item of damages should not be included in an award under the death statute.

By the Court.—Judgment affirmed.

JORGENSON, Administrator, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

March 12—April 8, 1913.

Railroads: Grade crossings: Safeguards: Speed of trains: Statutes: Construction: "Gates:" "Electric bell:" Injury to person: Contributory negligence: "Gross negligence:" Proximate cause.

1. The grade-crossing statute (sec. 1809, Stats.), though drastic in its provisions, is a statute *in favorem vitæ*, and in construing it, if there be room for two meanings, the courts should give to it such meaning as will result in the accomplishment of the legislative purpose, rather than a meaning that will tend to defeat that purpose.
2. The term "gates," as used in that statute, means, not a single gate, but gates upon both sides of the track, and to constitute a compliance with the act, where a railway company adopts gates as a safeguard, both must be maintained and operated.
3. If a gate becomes temporarily out of commission and its repair requires the services of an expert workman not immediately at hand, the statute can be satisfied by the placing of a flagman at the crossing for the time being, or the speed of trains can be temporarily reduced to meet the new situation, and it is the duty of the railway company to adopt one or the other of these courses.
4. The running of trains by a railway company at a speed exceeding twelve miles per hour over a grade street crossing in a city, at a time when the prescribed safeguards are not maintained, is a violation of the statute and an "omission" to comply with its requirements, and in an action for personal injuries caused thereby no want of care on the part of the person injured, less than gross negligence, will bar a recovery.

5. The requirement in the statute of "an efficient electric alarm bell or signal properly installed and in good working order" refers clearly to the well-known appliance in common use at railroad crossings, namely, a bell or gong arranged with electric wires so as to ring automatically and continuously so long as a car or engine is on the crossing or within a given distance of it; and a tower bell rung by hand is not a compliance therewith.
6. The term "gross negligence," incorporated into said sec. 1809 by ch. 653, Laws of 1911, had, before that law was passed, received a very certain and definite meaning in the jurisprudence of this state, excluding mere inadvertence in any degree; and it must be conclusively presumed that the legislature knew of such meaning and used the words deliberately, intending to give them their established legal significance.
7. As there used, gross negligence would cover not merely a suicidal act, but any entry by a person upon the crossing with a reckless disregard of the consequences, not caring what result might happen to him or to the occupants of the train.
8. Plaintiff's intestate, on his way to his work, approached a double-track crossing with which he was familiar and which had been for many years protected by gates, and found it occupied by an engine and cars engaged in switching, with the nearer gate down. Passing by the gate and around the rear of the switch engine which still obstructed the walk, he was seen to look up the track, but the jury found that his view was obstructed by smoke and steam from the engine. The gate on the opposite side was up and he proceeded to cross at an ordinary walk and was about over the last rail of the further track when struck by a passing train. *Held*, that he was not guilty of gross negligence as a matter of law.
9. Evidence showing the facts above stated is *held* to sustain a finding by the jury that the speed of the train, exceeding twelve miles per hour, was the proximate cause of the death.

BARNES and MARSHALL, JJ., dissent.

APPEAL from a judgment of the municipal court of Racine county: WILLIAM SMIEDING, JR., Judge. *Affirmed.*

The plaintiff's intestate was killed by a train while crossing the defendant's tracks at the State street crossing in the city of Racine. The evidence showed the following state of facts: State street runs east and west and crosses the tracks of the defendant at grade and practically at a right angle just

north of the defendant's passenger station in Racine. It is a very busy street, and the crossing is furnished with gates operated from a tower; a bell is also located in the tower, which is continuously sounded by the tower man when the gates are down. There is a double track at this point, the east track being used by south-bound trains and the west track by north-bound trains. At 11 o'clock of the night before the accident the east gates refused to operate because of the freezing up of some of the air pipes or conduits by which they were controlled from the tower. This condition remained until after the accident, and the east gates remained standing up during the whole time. At about 8:30 a. m. of March 8, 1912, the deceased, a carpenter by occupation, familiar with the crossing, approached the crossing from the west, walking on the north sidewalk of the street. The tower bell was ringing as he approached. The west gates, which covered the roadway of the street, were down. There is testimony tending to show that the north arm of the west gates, which normally extended horizontally across the north sidewalk of the street, stood at an angle of forty-five degrees, but this is disputed by the defendant's witnesses, and also claimed to be mechanically impossible. As the deceased came to the gates, switching was being done on the west track; an engine headed north with its bell ringing was slowly pushing a string of ten or eleven freight cars northward. The deceased passed under the north gate, and, as the switch engine passed northward, he stepped out into the street and around the south end of the tender, and into the eight-foot space between the north-bound and south-bound tracks. The testimony tends to show that considerable smoke and steam escaped from the switch engine and obscured the vision immediately north and north-east of the deceased at this time. He proceeded eastward without stopping, and just as he was about to clear the east rail of the east (or south-bound) track a passenger train from the north, due at about that time, struck him, causing instant death.

The following special verdict was returned by the jury:

"(1) Was the defendant guilty of any want of ordinary care in failing to properly maintain and operate the gates, or provide some equivalent safeguard, at the crossing in question, at the time said deceased was struck by defendant's engine? *A.* Yes.

"(2) If you answer question number 1 'Yes,' then was such want of ordinary care the proximate cause of the death of said deceased? *A.* Yes.

"(3) Did the engine and train which struck and killed deceased, approach and cross State street at a rate of speed exceeding twelve miles an hour? *A.* Yes.

"(4) Was the defendant guilty of a want of ordinary care in running said train at said rate of speed, at that time and place, under the circumstances? *A.* Yes.

"(5) If you answer question number 4 'Yes,' then was such want of ordinary care the proximate cause of the death of said deceased? *A.* Yes.

"(6) Was deceased's view of the approaching south-bound train obstructed by smoke and steam from the switch engine, as he passed towards the east from behind said engine? *A.* Yes.

"(7) Was the deceased guilty of gross negligence in attempting to cross said tracks, under the circumstances? *A.* No.

"(8) What sum of money will compensate the person or persons entitled thereto for the death of Nels C. Jorgenson? *A.* $3,500."

From judgment for the plaintiff upon this verdict the defendant appeals.

Edward M. Smart, for the appellant, cited, *inter alia, Lake Shore & M. S. R. Co. v. Ehlert,* 63 Ohio St. 320, 58 N. E. 812; *Debbins v. O. C. R. Co.* 154 Mass. 402, 28 N. E. 274; *Marden v. B. & A. R. Co.* 159 Mass. 395, 34 N. E. 404; *Cleary v. P. & R. R. Co.* 140 Pa. St. 19, 21 Atl. 242; *Sheehan v. P. & R. R. Co.* 166 Pa. St. 354, 31 Atl. 120; *Ludolf v. C. & N. W. R. Co.* 116 Ill. App. 239; *Theobald v. C., M. & St. P. R. Co.* 75 Ill. App. 208; *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 82 N. W. 295; *Haetsch v. C. & N. W.*

R. Co. 87 Wis. 304, 82 N. W. 295; *Groesbeck v. C., M. & St. P. R. Co.* 93 Wis. 505, 67 N. W. 1120; *Emery v. B. & M. R. Co.* 173 Mass. 136, 53 N. E. 278; *Douglas v. C., M. & St. P. R. Co.* 100 Wis. 405, 76 N. W. 356; *Holdridge v. Mendenhall,* 108 Wis. 1, 83 N. W. 1109; *Coel v. Green Bay T. Co.* 147 Wis. 229, 133 N. W. 23.

Wallace Ingalls, attorney, and *John B. Simmons,* of counsel, for the respondent.

WINSLOW, C. J. By sec. 1809 of the Statutes the legislature has endeavored by various imperative requirements to eliminate as far as possible the dangers of the grade crossing.

Sub. 1 of this section prohibits the running of a train or locomotive in any incorporated city or village faster than twelve miles per hour while approaching and within twenty rods of any grade street crossing. Sub. 2 provides that whenever a railroad company "shall erect, maintain and operate" gates, or "maintain a flagman" at any such grade crossing, a train or locomotive may be run at a speed not exceeding thirty miles an hour, and if it shall maintain "an efficient electric bell or signal properly installed and kept in good working order," at a speed not exceeding twenty miles an hour, while approaching and within twenty rods of and while crossing such grade crossing. Sub. 3 provides for the ringing of the engine bell continuously while approaching such crossings, except where gates or flagmen are maintained. Sub. 4 provides for the blowing of the whistle and the continuous ringing of the engine bell as the engine approaches a country grade crossing. Sub. 5 requires the erection and maintenance of signs at all highway crossings, and sub. 6 provides that in any action brought to recover for personal injuries or death, if it appears that such injuries or death was caused by the "omission" of a railroad company to comply with any of the requirements of the section, the fact that the person injured or killed was guilty of any want of ordinary

care contributing to the injury or death shall not bar a recovery, and no want of care on the part of the person injured or killed, "less than gross negligence," shall bar such recovery.

In the present case it was found upon sufficient evidence that the train which struck and killed the deceased approached and crossed State street at a speed exceeding twelve miles an hour; hence, unless the defendant company maintained either gates, a flagman, or an electric bell or signal at the crossing, there was clearly a violation of the statute by the railroad company in this instance, which, if it proximately caused the death of Jorgenson, renders the railroad company liable therefor in the absence of gross negligence on his part.

It is argued by the appellant (1) that, as to a foot passenger approaching from the west, the gates were maintained within the meaning of the law if the west gates were operated, even though the east gates were out of commission; (2) that "maintain and operate" gates does not mean to keep in perfect condition every minute whatever happens, but must be reasonably construed as meaning only a duty to keep them in a state of repair, *i. e.* to put competent operators in charge, employ competent repair men, and use reasonable diligence to keep the same in continuous operation; (3) that neither the failure to have the east gate down nor the maintaining of a speed exceeding twelve miles an hour, in the absence of gates or a bell, can be held to be an omission to "comply with the requirements" of the statute.

We are not disposed to adopt any narrow or restricted view of the requirements of this statute. It is said to be a drastic statute, and there is more or less truth in the statement. It is also, however, a statute *in favorem vitæ*. The legislature, in view of the appalling frequency of grade-crossing accidents, deemed it best to safeguard the public by requiring careful and somewhat burdensome precautions to be taken by

railroad companies, especially as to city crossings. The wisdom or exact justice of these requirements is not for the courts to determine or criticise. So long as no positive constitutional right is infringed upon, the legislature has full power to prescribe the means by which the grade-crossing danger is to be obviated or lessened. The duty of the courts is to give effect to the legislative intention, if the intention be clear; to give the law such meaning (if there be room for two meanings) as will result in the accomplishment of the legislative purpose, rather than a meaning that will tend to defeat the purpose.

We can give no such restricted meaning to the statute before us as counsel for defendant claim should be given to it. Its words are specific and clear. The railroad company is relieved of the twelve-mile restriction when it "shall erect, *maintain* and *operate*" the gates, not when it shall erect and keep them in repair, or exercise due care to operate them. It is not necessary now to decide what conclusion we might reach in a case where the apparatus was suddenly wrecked by accident and, before opportunity for repair, a passenger was killed or injured on the crossing by reason of the absence of the gates. That case is not here. In the present case the east gate had been out of commission for more than nine hours at a crossing in a populous city where 150 trains a day cross the street. If the repair of the gates required the services of an expert workman not immediately at hand, the statute could have been satisfied by the placing of a flagman at the crossing for the time being, or the speed of trains could have been temporarily reduced to meet the new situation, and we hold that it was the duty of the defendant to adopt one or the other of these two courses. As to the contention that the statute is satisfied so far as an east-bound passenger is concerned, if the west gate alone be operated, the same general propositions apply. It is plain that there might well be cases where the failure to operate the gates upon one side of the crossing

might easily operate as a trap to the unwary traveler, especially if he had been accustomed to see both sides operated simultaneously. The statute contains no intimation that its terms will be satisfied as to any person by the operation of one gate. It requires not only the erection of *gates* (meaning unquestionably a gate on each side), but the maintenance and operation of *gates* as well. If two gates are to be erected, two gates are to be operated.

We have not been able to appreciate the argument made under the third head above referred to, and will simply say that we are unable to agree with it.

We reach the conclusion, therefore, that under the undisputed evidence gates were not maintained at this crossing at the time of the accident in question.

Was there an "efficient electric alarm bell or signal properly installed and kept in good working order" at this crossing at the time of the accident? Plainly this question must be answered in the negative on the undisputed evidence. The legislature evidently had in mind a known, common appliance with which every one who does any considerable amount of traveling by rail is familiar, namely, a bell or gong arranged with electric wires, so as to ring automatically and continuously so long as a car or engine is on the crossing or within a given distance of the crossing on either side. It is not for any person to say that a bell operated by hand and rung continuously during the same time answers every purpose of the law, and hence ought to be considered as satisfying the statutes. *Ita lex scripta est.* Only by compliance with the law as written is a speed exceeding twelve miles an hour permitted. In the present case there has been no compliance with the law as written, either with respect to the gates or the bell.

It is argued that the deceased was guilty of gross negligence as matter of law, and hence that the court should have changed the answer to the seventh question and rendered judg-

ment for the defendant. We cannot so hold. The provision exempting the injured party from the legal consequences of all contributory negligence less than gross negligence first appears in ch. 653 of the Laws of 1911, and takes the place of a clause contained in ch. 332 of the Laws of 1909, which was milder in its terms, and provided only that a slight want of ordinary care contributing to the injury or death should not bar a recovery. Gross negligence has received a very certain and definite meaning in the jurisprudence of this state, somewhat different from the meaning given to it in other states. It is not inadvertence in any degree; there must be present either wilful intent to injure or that wanton and reckless disregard of the rights of others and the consequences of the act to himself as well as to others which the law deems equivalent to an intent to injure. *Willard v. C. & N. W. R. Co.* 150 Wis. 234, 136 N. W. 646, and cases there cited.

That meaning has been so thoroughly intrenched and established here that it must be conclusively presumed that the legislature knew of such meaning, and used the words deliberately intending to give them their established legal significance. The words do not seem to be very happily applied to situations where the first and perhaps the only serious result of the act under consideration will probably be the death of the actor himself or his serious injury; still, gross negligence under its accepted definition here would cover not merely a suicidal act, but any entry on the crossing with a reckless disregard of the consequences, not caring what result might happen to himself or to the innocent occupants of a train. It is by no means infrequent that a man partially intoxicated drives his horses over a grade crossing in utter and reckless disregard of consequences, thereby wantonly endangering not only his own life, but the lives of many others.

We find ourselves unable to say as matter of law that the deceased in the present case was guilty of gross negligence as the term is understood in Wisconsin. True, the proof showed

that he entered on the right of way when the gates were down and the tower bell ringing and attempted to cross the east track when his vision to the north was obscured by smoke and steam. This unquestionably constitutes a high degree of negligence strictly so called. In states like Massachusetts, where the difference between negligence and gross negligence is simply a difference in degree, it might perhaps be said that gross negligence was proven here as matter of law (*Debbins v. Old Colony R. Co.* 154 Mass. 402, 28 N. E. 274), but with our standard of gross negligence, a standard which rejects inadvertence and inattention entirely, we cannot so hold. The question was for the jury.

The question whether any omission or omissions to comply with any of the requirements of sec. 1809 can properly be held to have proximately caused the death of Jorgenson still remains to be considered.

The first requirement is that no train or locomotive shall approach a grade crossing in any incorporated city or village at a greater speed than twelve miles an hour, *provided,* however, that if the company maintain gates or a flagman a speed of not exceeding thirty miles an hour may be lawfully used, and in default of these, if it maintain an electric bell, a speed of not exceeding twenty miles an hour may be lawfully used. These provisos are not requirements perhaps in the strictest sense. No railroad company is required by the law to maintain flagman, gates, or bell (except as it may be said that the third subdivision requires the company to comply with local municipal regulations in this regard); but if the railroad company wishes to operate its trains at a greater speed than twelve miles an hour while approaching such grade crossings, *it is required* to maintain and operate one or the other of these safety devices. In this sense these provisions are requirements. The defendant here chose to install and attempt to maintain gates, and thus be allowed to run its trains at a speed exceeding twelve miles an hour. If, after installing

the gates, it failed to maintain them or to provide the electric bell, it violated the law when it ran its trains at a speed exceeding twelve miles an hour during the time that these safeguards were not maintained. We have already held that the defendant did fail to maintain the gates, and there is no proof that it maintained a flagman or an electric bell; so it is an undisputed fact under the evidence that it failed or omitted to comply with the requirement of the law when it ran the train in question over the State street crossing at a speed exceeding twelve miles an hour. The jury have found that the running of the train at that rate of speed was a proximate cause of the injury. If this finding has sufficient support in the evidence, no reason is perceived why judgment for the plaintiff does not necessarily follow.

It is argued that the excessive speed of the train cannot properly be held to be the proximate cause of the accident because the deceased would have met with the same disastrous results had he stepped in front of a train going twelve miles an hour, and the doctrine of the case of *Holdridge v. Mendenhall,* 108 Wis. 1, 83 N. W. 1109, and the Pennsylvania cases therein cited, is relied upon as authority for the position. All these cases are cases where a child, without looking, ran against or immediately in front of a moving street car in plain sight, and it was apparent that whatever the speed of the car was it bore no proximate causal relation to the accident. This proximate causal relation must exist if there is to be a legal liability based upon excessive speed. Whether it does exist or not will necessarily depend on the surrounding circumstances in each case.

In the present case the crossing was a much used crossing in a populous city. It is in evidence that as the deceased emerged from behind the switch engine and while he was crossing over the eight-foot space between the west and east tracks he looked both north and south. It is also in evidence that considerable quantities of smoke and steam from

the switch engine were carried to the eastward, and must have obscured the view of the east track north of State street. The eastern gates were standing upright. The presence of obstructions to the view, the noise of other moving engines, as well as the presence of an assurance of safety like the open gate, are very material facts when considering the question of what ought to be anticipated as the natural result of excessive speed. The inference is entirely justifiable that the deceased saw no locomotive when he looked to the north on account of the presence of the smoke and steam, and that, on that account as well as on account of the apparent invitation of the open gate, he started to cross the east track. Knowledge of these conditions must be imputed to the servants of the railroad company who were operating the locomotive, and so the question is whether with such knowledge they should not have anticipated injury to some person as the result of the excessive speed.

How far up the track the deceased was able to look is not capable of proof, but the fact that he kept on his course steadily eastward, without hurrying his steps, justifies the inference that he could look far enough so that he would have been safe in crossing if the approaching locomotive was going at the rate of twelve miles an hour instead of at a higher rate. He had almost reached a place of safety when struck. It seems fairly certain that a very small decrease in the speed would have spelled life instead of death. We feel unable to say that the unlawful and negligent speed was not properly found to be the proximate cause of the accident.

No other questions require discussion.

By the Court.—Judgment affirmed.

BARNES, J. (*dissenting*). Sec. 1809, Stats., imposes an absolute liability for injury at a grade crossing in cities, where a train is running at a speed of more than twelve miles an hour and not to exceed twenty miles an hour, unless

the railway company either maintains gates, a flagman, or an electric signal bell, provided *the "injury . . . was caused by the omission* . . . to comply with . . . the requirements of section 1809," and provided further that the party injured was not guilty of gross negligence. If the speed exceeds twenty miles per hour and does not exceed thirty, then the same rule of liability obtains unless the railway company maintains a flagman or gates.

I do not disagree with the conclusion of the court that none of the safeguards above provided for were maintained at the time of the accident. I also think that the jury might find that the accident would not have happened had the east gates been in working order. Still I think a case for recovery under the statute was not made out. As I read the evidence, it would not support a finding by the jury that the speed of the train at the time of the accident exceeded twenty miles an hour. The train might lawfully be run at this rate of speed if an electric bell had been maintained. The liability created by the statute does not exist in such a case *unless the failure to maintain such a bell caused the injury.* The proof is clear and uncontradicted that the gong in the tower was loud and clear when sounded and that it was constantly sounded from the time the deceased approached the west gates until he was struck. I am unable to see how any one can say that if a bell operated by electricity had been installed and was in working order the deceased would not have entered upon the tracks, when he disregarded a signal in every way as well calculated to give notice of the approach of a train. Unless it can be said that the electric bell would deter him although the gong did not, the absence of the electric bell did not cause the injury and the defense of contributory negligence would be available. The legislature no doubt prescribed the use of an electric bell because it works automatically and is sure in operation when properly cared for. That the deceased would

heed a bell operated by electric power when he disregarded a bell in every way as well calculated to give warning, operated by hand power, seems to me to be an extremely attenuated and speculative assumption. Admittedly the statute is a drastic one and effect should be given to that part of it which makes the liability absolute only in case the absence of the safeguards provided for causes the injury. In any case where a train is run over a grade crossing at a speed of more than twelve and not to exceed twenty miles an hour, where a party injured is guilty of contributory negligence he cannot recover without establishing the following facts: (1) that he was not guilty of gross negligence; (2) that neither the gates, electric bell, nor flagman provided by statute were maintained; and (3) that if any one of those three safeguards had been maintained the accident would not have happened. It is clear that where the speed does not exceed twenty miles an hour an injured party cannot claim the benefit of the statute by simply showing that if gates had been maintained the accident would not have occurred. In this case all three safeguards were lacking. If the injured party can make out a case by showing the absence of gates, he can make one by showing that there was no flagman or no bell. The railway company has the right to select the safeguard it will use, and it is only on a showing that any one of them would suffice that a case can be made. This, as it seems to me, is the plain and obvious meaning of the statute. If there was any evidence in the case tending to show that the electric bell would have been more likely to prevent this accident than would the hand bell, I could see my way clear to assent to an affirmance of the judgment. But there is no such evidence. Indeed the proof is quite to the contrary.

The jury did not pass on the actual speed of the train. If the record contains anything more than a mere scintilla of evidence to show that the speed exceeded twenty miles an

hour, then there has been a mistrial. No finding by the court upon the point can be presumed, because the evidence would not support it and because the defendant requested that a question be submitted to the jury specifically covering the rate of speed.

MARSHALL, J., concurs in the foregoing dissenting opinion.

SIGGINS, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

March 12—April 8, 1913.

Money had and received: Carriers: Interstate shipment: Misrouting: Overcharge: Jurisdiction: Federal courts.

1. A common-law action for money had and received is based upon the theory not only of loss to plaintiff but of the consequent enrichment of the defendant, or of someone for whom he may act, by reason of having received more money than he is entitled to.
2. Where, by reason of misrouting by the initial carrier, the total freight charges paid by the consignee to the last carrier were in excess of the legal charges for transportation by the cheapest route, but none of the carriers received more than the lawful rate for carrying the goods over the route by which they were actually sent, an action by the consignee against the last carrier for money had and received will not lie.
3. Under the Interstate Commerce Act the interstate commerce commission and the federal courts have exclusive jurisdiction of all claims for overcharges on interstate shipments, whether they grow out of an excessive rate or out of misrouting.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

Action originally brought in a justice's court to recover $70.89 alleged to have been paid the defendant as a freight overcharge upon a shipment of furniture from Thomasville,

North Carolina, to Milwaukee. The following facts were stipulated by the parties: The plaintiff purchased the goods mentioned in the complaint from the Thomasville Furniture Company, Thomasville, North Carolina, about July 2, 1906, to be shipped to the plaintiff at Milwaukee. Thereupon the Thomasville Company delivered the goods to the Southern Railroad Company, consigned to the plaintiff, to be carried from Thomasville, North Carolina, to Milwaukee. The Southern Railroad Company carried them from Thomasville to Memphis, at which point it delivered them to the Illinois Central Railroad Company for carriage from Memphis to Chicago. The charges of the Southern Railroad Company, from Thomasville to Memphis, were $84.84. The charges of the Illinois Central Railroad Company, from Memphis to Chicago, were $97.44. The Illinois Central Railroad Company delivered the goods to the defendant, which carried them from Chicago to Milwaukee, and its charges were $14.28, making total freight charges of $196.56, which were the legal charges for the route over which they were carried. The cheapest route from Thomasville to Milwaukee was by way of Virginia City to Cincinnati and Chicago, and if the goods had been transported over that route the legal freight charges would have been $119.28. The misrouting of the goods was the fault of the Southern Railroad Company, which was the initial carrier. The goods were carried by the defendant between Chicago and Milwaukee at the legal rate, which was as low as that of any other carrier between said points. The amount paid by the plaintiff to the defendant was $196.56, in which were included the charges of the other carriers.

The answer pleaded the defense that the misrouting of said goods was the fault of the Southern Railroad Company, which was the initial carrier, and that the defendant carried the goods from Chicago to Milwaukee at the lawful rate, and was not liable for the difference in freight charges between the respective routes.

The court found that the goods were shipped over the route on which they moved through the fault of the Southern Railroad Company, the initial carrier; that the freight charges upon the goods according to the cheapest through route from Thomasville to Milwaukee were $119.28, and entered judgment against the defendant for $77.28, the difference between the amount found due for freight charges if the goods had been moved by the nearest route, and the amount paid the defendant. From such judgment the defendant appealed.

For the appellant there was a brief by *William G. Wheeler* and *Edward M. Smart,* and oral argument by *Mr. Smart.*

Douglas J. Mangan, for the respondent.

VINJE, J. This action was originally begun in justice's court to recover for a freight overcharge on an interstate shipment. The complaint and stipulated facts both show that such is the nature of the action, and that the overcharge was the result of the misrouting of the goods by the initial carrier. Plaintiff now claims that it is an action for money had and received and as such may be brought in the state courts. True, a specified sum of money is sought to be recovered from the defendant, but the complaint and stipulated facts show that such sum was exacted from plaintiff by reason of the failure of the initial carrier to properly route the shipment. They further show that none of the carriers exacted or received more than the lawful rate for carrying the goods over the route which they were actually sent; that defendant was under legal obligations to pay over to each of the preceding carriers, including the initial carrier, the amount of freight charged by it, and that when such charges were paid defendant was left with only its lawful freight charge. None of the carriers, therefore, received more than its lawful charge for the service it rendered. None was enriched by the payment of plaintiff. It is conceded that plaintiff suf-

fered damage by reason of the misrouting. But a common-law action for money had and received is based upon the theory not only of loss to the plaintiff *but of the consequent enrichment* of the defendant or of some one for whom he may act, by reason of having received more money than he is entitled to. 27 Cyc. 869; *Limited Inv. Asso. v. Glendale Inv. Asso.* 99 Wis. 54, 74 N. W. 633; *Johnston v. Charles Abresch Co.* 109 Wis. 182, 85 N. W. 348; *Glendale Inv. Asso. v. Harvey L. Co.* 114 Wis. 408, 90 N. W. 456; *Douglas Co. v. Sommer,* 120 Wis. 424, 98 N. W. 249; *J. V. LeClair Co. v. Rogers-Ruger Co.* 124 Wis. 44, 102 N. W. 346; *Marine Co. v. Milwaukee,* 151 Wis. 239, 138 N. W. 640. So it is evident in the instant case, under the stipulated facts, that plaintiff has been damaged by the misrouting of the goods by the initial carrier, without its appearing that any one has been in the least enriched thereby.

Moreover, where it appears that there has been an overcharge of freight on an interstate shipment due to misrouting, such overcharge cannot be recovered in an action for money had and received. To permit that would be to permit parties to evade the provisions of the Interstate Commerce Act. The proceeding must be under the act to recover the overcharge. Treating this action, then, as one to recover an overcharge on an interstate shipment, the question arises, Can it be maintained in a state court? Sec. 9 of the original Interstate Commerce Act (24 U. S. Stats. at Large, 379, ch. 104) provides:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction."

This in terms limits the jurisdiction of suits under the act

to federal courts. But it is claimed that, under the provisions of sec. 22 of the act, state courts also have jurisdiction. That section reads: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." It must be deemed that the right of jurisdiction in state courts under this section is negatived in the case of *Adams Exp. Co. v. Croninger,* 226 U. S. 491, 33 Sup. Ct. 148, which construed the following amendment to sec. 20 of the Interstate Commerce Act (34 U. S. Stats. at Large, 595, ch. 3591), commonly known as the Carmack amendment:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

It was there held that the proviso preserved to the holder of the receipt or bill of lading only such remedy as he may have had under existing federal law at the time of his action, and not such as he may have had under state law, because of the evident intent of Congress to take possession of the subject of the liability of carriers of interstate shipments and to supersede all state regulations in reference thereto. That the same intent is evident in this part of the act cannot be doubted. The purpose was to place the whole subject of the liability of interstate carriers under the control of the interstate commerce commission and the federal courts, to the end

that there might be uniformity of rulings with reference thereto. The court says:

"To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme, or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment."

That the interstate commerce commission and the federal courts have exclusive jurisdiction of all claims for overcharges on interstate shipments, whether they grow out of an excessive rate or out of misroutings, is sustained by the following authorities: 1 Drinker, Int. Comm. Act, § 245; Watkins, Ship. & Carr. § 200; Snyder, Ann. Int. Comm. Act, p. 161; *Morrisdale C. Co. v. Penn. R. Co.* 183 Fed. 929; *A. J. Phillips Co. v. G. T. W. R. Co.* 195 Fed. 12; *Jacoby v. Penn. R. Co.* 200 Fed. 989; *Texas & Pac. R. Co. v. Abilene C. O. Co.* 204 U. S. 426, 27 Sup. Ct. 350. It follows that the trial court erred in entertaining jurisdiction of the case.

By the Court.—Judgment reversed, and cause remanded with directions to dismiss the action.

KIEPERT, Respondent, vs. NUGENT, Appellant.

March 12—April 8, 1913.

Husband and wife: Competency of wife as witness: Agency: Contract to effect reconciliation: Validity: Deceit.

1. A wife cannot testify in her husband's behalf except as to matters in which she acted as his agent.
2. In an action upon a promissory note, where defendant claimed that under an agreement with plaintiff he should be credited a certain sum for bringing about a reconciliation between plaintiff and his wife and testified to the transactions with the

wife for the purpose of showing that such reconciliation was effected by him, the wife was not a competent witness to deny defendant's statements as to such transactions; and the error in permitting her to testify on that subject is ground for a reversal.

3. The wife was competent, however, in such a case to testify as to conversations with and admissions by the defendant upon an occasion when, as agent for her husband, she went to defendant to collect a balance supposed to be due on the note in suit.
4. An agreement by a husband, estranged from his wife, to pay a third person for effecting a reconciliation, is a legal contract, laudable in its purposes, and the right to recover thereon is not defeated by the fact that, in order to make a greater inducement to the wife, such third person joined with the husband in a scheme to deceive her as to the amount of money possessed by the husband.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

This is an action to recover a balance of $600 alleged to be due upon a promissory note of $700, and the defense was that $230 had been paid thereon in cash and $450 in services performed by defendant at the request of the plaintiff.

The plaintiff was treated for inebriety at the defendant's sanitarium, and the original sum of $700 was turned over to the defendant for safe keeping when the plaintiff entered the sanitarium, and a note given for the amount. At that time a divorce action was pending against the plaintiff, and it is undisputed that the defendant made some payments of alimony in that action on behalf of the plaintiff out of the money received by him as aforesaid. It is undisputed also that the defendant went to see plaintiff's wife and her counsel several times about a reconciliation, and that finally the plaintiff's wife came to the sanitarium and took a meal with her husband, and that a reconciliation was then effected. The defendant claims that the plaintiff had agreed to allow him $450 as a payment on the note if he succeeded in bringing about a reconciliation, and that the reconciliation was due to his efforts. The plaintiff denied that any such agreement

was made, and also denied that the reconciliation was in fact brought about by the defendant. A general verdict for the plaintiff for the amount claimed in the complaint was rendered, and the defendant appeals.

For the appellant the cause was submitted on the brief of *W. J. Kershaw.* He cited *Mountain v. Fisher,* 22 Wis. 93, 97; *Carney v. Gleissner,* 58 Wis. 674, 17 N. W. 398; *Hale v. Danforth,* 40 Wis. 382.

For the respondent the cause was submitted on the brief of *Runkel, Runge & McLogan.*

WINSLOW, C. J. There is but one question of serious importance in the case, namely, the question of the admissibility of the evidence of the plaintiff's wife in his behalf. The defendant, *Nugent,* had testified to the contract made with the plaintiff and to the visits which he made to the plaintiff's wife and her attorney in his endeavor to bring about a reconciliation, and to the facts as to the final meeting of the parties at the sanitarium when the reconciliation actually took place. He was allowed also to testify that the reconciliation so made was brought about by him. Upon rebuttal the plaintiff's wife was called as a witness, and was allowed, against objection for incompetency, to testify in detail as to her conversations with the defendant, and to deny that *Nugent's* efforts brought it about, and to state why she became reconciled to her husband. This testimony was admitted on the ground that the defendant had been examined as to these transactions with the wife, and that it was thus made proper to call the wife to deny the defendant's statements as to his transactions with the wife. The general rule that the wife cannot testify on her husband's behalf, except as to matters in which she acted as his agent, is freely conceded, but the claim is made that the situation justifies and demands a further inroad on the general rule on the ground of the necessities of the case.

Whether the general rule is wise or logical is not necessary

to be considered. With the single exception above noted, it has been laid down and followed by this court since a very early day. *Hale v. Danforth*, 40 Wis. 382; *Goesel v. Davis*, 100 Wis. 678, 76 N. W. 768; *Tradewell v. C. & N. W. R. Co.* 150 Wis. 259, 136 N. W. 794. If it is to be changed now, we think it should be done by legislative act. The introduction of competent evidence by the defendant as to his interviews with the wife can make no difference with the rule. This is not a case where evidence, otherwise incompetent, may become competent by reason of the introduction of evidence on the subject by the opposing party. Sec. 4070, Stats. The receipt of this incompetent evidence must be considered as affecting the substantial rights of the defendant, and hence must be held as sufficient ground for a reversal.

The evidence of the wife was also received, against objection for incompetency, as to conversations with and admissions made by the defendant on an occasion when she went to defendant's sanitarium to collect the balance supposed to be due upon the note. As the plaintiff had previously testified that he sent his wife to collect the note, it seems that this testimony was clearly admissible under the exception to the general rule above stated.

It is suggested that the defendant cannot be heard to make his defense because, by his own evidence, he convicts himself of having committed a fraud on the wife in his attempt to procure a reconciliation between the parties. The defendant testified that when he received the $700 from plaintiff April 2, 1907, he gave the plaintiff a sixty-day note for the same (which he produced on the trial) which provided for the payment of the $700, "less services of maker and such advances made at, to, or for said *Rudolph Kiepert.*" The defendant further testified that on the 25th day of May following, after plaintiff's wife had consented to come and talk with him at the sanitarium and it was

thought that a reconciliation might be effected, the plaintiff told him that he must have a note which would show his wife that he had $600 of his own or she would not be reconciled, and defendant then consented to make a new note for $700, without condition, but with an indorsement of $100 paid March 20th upon the back, on the condition that this second note was to be exchanged for the original after the reconciliation was effected. It is said that this scheme is fraudulent and vitiates the defendant's claim for any compensation. We do not think so. The legal principle is that a contract to invade the legal rights of another, either as to person, property, or reputation, is invalid, but there was no such contract here. 1 Page, Contracts, § 401. The contract here, if there was one, was a perfectly legal contract,—in fact, a contract laudable in its purposes so far as both public and private interests are concerned. The reconciliation of all estranged married persons is very much to be desired. There is nothing, therefore, which can be urged as avoiding the contract at the time it was made, nor afterwards up to the very day of the reconciliation. The object was good; it was the duty of both husband and wife to be reconciled, if possible, whether the husband had money or not. The deceit, if there was deceit, was incidental and participated in by both plaintiff and defendant. It made the inducement for reconciliation on the part of the wife a little greater, perhaps, but it infringed none of her rights and did her no legal wrong. We are unable to see how it could deprive the defendant of the fruits of his labors, if in fact there was a valid contract made originally and if in fact it was due to his efforts that a reconciliation finally took place.

By the Court.—Judgment reversed, and action remanded for a new trial.

WEBER, Appellant, vs. WEBER, Respondent.
SAME, Respondent, vs. SAME, Appellant.

March 12—April 8, 1913.

Judgment: Modification: Divorce: Alimony: Misconduct of wife after judgment: Final division of property: Requiring payment of arrears of alimony.

1. A circuit court has full control of its judgments (including judgments for divorce) during the term within which they are rendered, and may vacate or modify the same at any time during the term, with or without a motion therefor by the parties thereto or those affected thereby.
2. Misconduct of the wife occurring subsequent to the entry of the final judgment of divorce may be a sufficient ground for modifying the allowance of alimony.
3. Upon evidence in this case showing such misconduct of the wife and satisfying the court that she evinced a permanent disposition to err, a modification of the judgment so as to provide for a final division of the property, instead of alimony, was proper.
4. Where such modification of the judgment was made by the trial court upon the basis that alimony for three months, then in arrears, should be paid by the husband in addition to the sum he was required to pay in the division of his property, a subsequent order requiring payment of such past-due alimony was proper.

APPEALS from a judgment and an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

On the 17th of December, 1910, plaintiff obtained an interlocutory decree of divorce against the defendant on the ground of cruel and inhuman treatment. The decree awarded plaintiff alimony in the sum of $50 per month payable on the first day thereof. Before final judgment was entered upon the interlocutory decree the defendant, on January 10, 1912, obtained an order to show cause why the provision of the decree relating to alimony should not be stricken out because of alleged misconduct of the plaintiff since the entry thereof.

After a hearing upon this motion, at which testimony was taken and affidavits were presented, the provision was allowed to stand, and a final judgment in accordance with the terms of the interlocutory decree was entered on February 19, 1912. On the 12th day of March, 1912, the defendant obtained another order to show cause why the same relief should not be granted on the ground of misconduct of plaintiff after the entry of the final judgment. Plaintiff objected to the hearing of the last motion on the ground that the facts alleged in support thereof were not sufficient to warrant or authorize a modification either of the interlocutory decree or final judgment. The objection was overruled, and after a hearing, at which testimony was taken and affidavits were presented, an order amending the interlocutory decree and final judgment was entered, and additional findings of fact were filed on May 2, 1912, wherein the court found that plaintiff had sexual intercourse with one Donald since the entry of the final decree on February 19th, and that she was a woman of bad character, and ordered that she be given the sum of $600 as a full and final division and distribution of the estate of the defendant, both real and personal, in lieu of all alimony. The January, 1912, term was by special order pursuant to sec. 2424, Stats., continued as to this case up to and including the 4th day of May, 1912. On the 2d of May, 1912, a final judgment in accordance with the order that day filed was entered, from which the plaintiff appealed.

On the 21st day of May, 1912, and at a subsequent term, plaintiff applied for an order requiring the defendant to pay the alimony of $50 per month for the months of March, April, and May, 1912, which was in arrears, and on the 1st day of June, 1912, the court entered an order directing the defendant to pay to the plaintiff the sum of $150 claimed to be due under the order of the 19th of February, 1912, for alimony for March, April, and May. From this order, after judgment, the defendant appealed.

For the plaintiff there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Louis B. Montfort,* of counsel, and oral argument by *Mr. Montfort.*

For the defendant there were briefs by *Stover & Stover,* and oral argument by *John S. Stover.*

VINJE, J. Upon the plaintiff's appeal it is claimed the court erred in entertaining a motion for the alteration of the decree of February 19, 1912, and in modifying the same by terminating alimony and making a final division of property between the parties. A sufficient answer to this claim is that the modification of the judgment was made within the term at which it was rendered. The record shows that the January, 1912, term was by special order, pursuant to sec. 2424, Stats., as to this matter adjourned till May 4, 1912, and that the modification was made May 2, 1912. It is well settled that a circuit court has full control over its judgments during the term within which they are rendered, and may vacate or modify the same at any time during the term with or without a motion therefor by the parties thereto or those affected thereby. *Hansen v. Fish,* 27 Wis. 535; *Smith v. Milwaukee E. R. & L. Co.* 119 Wis. 336, 96 N. W. 823; *Frost v. Meyer,* 137 Wis. 255, 118 N. W. 811; 1 Freeman, Judgments (4th ed.) § 90; 1 Black, Judgments (2d ed.) § 305. A judgment for divorce comes within this rule. *R—— v. R——,* 20 Wis. 331; *Brown v. Brown,* 53 Wis. 29, 9 N. W. 790. But it is not necessary to base the court's decision upon such a narrow ground, and it is deemed best to meet the claim of plaintiff's counsel that misconduct of the wife occurring subsequent to the entry of the final decree of divorce is no ground for modifying the allowance of alimony. To this point they cite *Holt v. Holt,* L. R. 1 Prob. & Div. 610; *Forrest v. Forrest,* 3 Bosw. 661, 671; *Flood v. Flood,* 5 Bush, 169; *Cross v. Cross,* 63 N. H. 444; *Stanfield v. Stanfield,* 22 Okla. 574, 98 Pac. 334; *Cole v. Cole,* 142 Ill. 19, 31 N. E. 109; *Cariens v. Cariens,* 50 W. Va. 113, 40 S. E. 335.

In *Holt v. Holt, supra,* it was held that the divorced wife was not entitled to alimony while she was living with another man as his wife and supported by him. The court said:

"The husband ought not to be called on to pay alimony for the time during which the wife had other means of support. It is immaterial, as far as this question is concerned, whether the respondent was living in adultery. The ground upon which the court proceeds is, that she was living in such a manner that she had means of support independent of her husband."

The case of *Forrest v. Forrest, supra,* decided in the superior court of New York in 1859 by four justices, sustains the point to which it is cited, though it should be noted that PIERREPONT, J., dissented from that part of the opinion which held that in fixing the amount of alimony the immorality and bad conduct of the wife, after the decree of divorce is pronounced and before the amount of permanent alimony is fixed, cannot be considered by the court.

In *Flood v. Flood,* 5 Bush, 169, a perpetual divorce from bed and board was granted to the parties, and by mutual arrangement a certain amount of property was conveyed by the husband to trustees to hold the same in trust for the use of the wife and the two children of the parties. Afterwards the wife assumed to marry one Armitage and lived with him as his wife, whereupon the first husband secured an absolute divorce from the bonds of matrimony, and subsequently brought an action to secure a reconveyance to him of the property conveyed to the trustees. The court refused to compel a reconveyance, saying:

"No doubt the Louisville chancery court properly adjudged a dissolution of the marital relations, and restored to him the custody of his children, and adjudged to him all property which she had received from him by reason of the marriage, or in consideration thereof; but it did not, nor could, adjudge to him the rights of property which had been conveyed and secured to her use for life, as a support in place of alimony."

In *Cross v. Cross,* 63 N. H. 444, the court said:

"There is no question as to the power to grant alimony in this case. Upon proper application and notice, the court may revise and modify any order made, and make such new orders as may be necessary respecting alimony. . . . Adultery committed by the plaintiff before or after the decree of divorce is not, as matter of law, a bar to this petition. The plaintiff may have earned the property, and justice may require a division of it, although both parties are corrupt. Whether the plaintiff is entitled to alimony is a question of fact."

In *Stanfield v. Stanfield,* 22 Okla. 574, 98 Pac. 334, it was held that a decree of divorce adjudging alimony to the wife in accordance with an agreement of the parties, unaffected by fraud or mistake, was not subject to modification upon motion filed by the former husband after the term at which the original decree was made. As incidental to that ruling the court said:

"After the divorce the parties go into the world as strangers to each other, and generally even the adultery of the wife, except possibly under special conditions not involved in this case, will not relieve the husband of the payment of alimony in accordance with the decree."

In *Cole v. Cole,* 142 Ill. 19, 31 N. E. 109, the court refused to reduce the allowance of alimony because of the subsequent misconduct of the wife, where it was not shown that the payments were to be made out of the earnings of the husband or that the property did not come originally from the wife or was not the result of their joint accumulations, and where it was not shown that her wrong doing may not have been the result of his prior failure to pay instalments of alimony as they became due. The court after reviewing the authorities says:

"Cases may be found, and others will arise in practice, where it may be highly unjust and inequitable that the husband should continue to support the wife. It is within the power of the court to compel the payment of alimony out of

the future earnings of the husband, whether the labor be manual or mental, and it might be, under these circumstances, unconscionable to compel the husband by his daily labor to support the divorced wife in idleness and prostitution. Not only reasons of justice, but authority, would seem to justify the court in such a case, in the exercise of its general chancery powers, to modify or revoke its former order. But there is no such case made by this petition."

In *Cariens v. Cariens,* 50 W. Va. 113, 40 S. E. 335, it was held that under a decree of divorce *a mensa et thoro* the husband might be discharged from the payment of alimony by the subsequent misconduct of the wife, and in the opinion it was stated:

"When a decree of absolute divorce gives alimony, the subsequent sexual intercourse by the late wife with other men is no ground for discharging the man from such alimony, because after such decree the woman is no longer free, no longer owes any duty of purity to the husband, and breaks no duty to him by her misconduct, however gross."

This statement, however, was not necessary to the point decided, and many of the authorities cited to sustain it fail to do so.

From a review of the above cases it will be seen that in none except *Forrest v. Forrest,* 3 Bosw. 661, is it held that the subsequent misconduct of the wife *cannot* be considered upon an application to modify the amount of alimony. That such misconduct may not in many cases bar the wife from further receiving alimony or even from a reduction of the amount determined in the original decree may well be conceded. But it is not in consonance with the evident intent of the statute, or with the judicial policy of this state, or with principles of natural justice, to hold that the subsequent misconduct of a wife of the character here found should not be considered by a court of equity in determining how much the husband shall continue to contribute to her support. If the facts disclose a single lapse from virtue, caused perhaps in some degree by

the misconduct of the husband; that he has in his possession property accumulated by the economy and labor of both during the married state; that the wife is without any means of her own and without the ability to earn a livelihood, then the court may well refuse to modify the amount of alimony awarded in the original decree. On the other hand, if the wife, without the fault of the husband and without any adequate excuse or palliation, deliberately chooses a life of shame and dishonor, has no other equitable claim upon property in the hands of the husband, and he is compelled by his daily toil to earn the money paid to her, the court may make the misconduct of the wife the ground for cutting off all alimony, or for reducing the same, as may in its discretion seem just and equitable under all the circumstances of the case. Our statute, sec. 2369, Stats., prescribes no grounds upon which a judgment for alimony may be modified. It wisely leaves that to the judgment of the court. The considerations that may legitimately influence such judgment are so varied and complex that legislative and judicial wisdom alike refrain from any attempt to enumerate them. This much, however, may be said: the courts of our state do not permit vice to flaunt its banner before them unchallenged. When it appears, its nature and extent may be inquired into, and if justice so demands, it may be made the ground of equitable relief in the allowance of alimony.

But in this case it cannot be said that there was any reduction of alimony. The court, upon the showing made of the subsequent misconduct of the wife, changed the judgment from one awarding alimony to one of a final division of property between the parties, and very properly so. The evidence was no doubt sufficient to satisfy the court that the wife evinced a permanent disposition to err. Under such circumstances the best administration of justice requires a financial as well as marital separation of the parties. The right to so modify the judgment is unquestioned. *Martin v. Martin,*

126 Wis. 237, 105 N. W. 783. No claim is made that the sum awarded the wife in the final judgment dividing the property was not adequate considering the financial condition of the defendant.

The defendant appealed from an order entered May 21, 1912, requiring him to pay the sum of $150 alimony due for the months of March, April, and May, 1912. It is argued by counsel for defendant that the judgment of final division of property entered May 2, 1912, settled all matters between the parties, and that no claim for past-due alimony can be maintained by plaintiff. This contention would probably prevail were it not for the fact that it appears from the affidavit in behalf of plaintiff and is not denied by the defendant that at the time the modification of the judgment of February 19th was considered by the court oral reference was made to this amount of unpaid and overdue alimony and the court from the bench said, "Let it be paid," and afterwards the court made the order for its payment. From this it must be inferred that the court did not include in the judgment of May 2d the alimony in dispute, and that the division of property was made upon the basis that this sum of $150 due for alimony should be paid in addition to the sum of $600 required to be paid by the judgment of May, 1912. So construing the action of the court, the order was properly made.

By the Court.—Upon the plaintiff's appeal the judgment is affirmed; upon the defendant's appeal the order is affirmed. No costs allowed to either party; the defendant to pay the clerk's fees.

LIERMAN, Appellant, vs. O'HARA and others, Respondents.

March 12—April 8, 1913.

Chattel mortgages: Validity: Failure to sign secured note: Sale with assent of mortgagor: Affidavit not required.

1. A chattel mortgage is not rendered void by the mere fact that the promissory note which it was given to secure was, through inadvertence, not signed by the debtor, where such unsigned note clearly states the amount of the debt and the terms and conditions agreed upon for its payment and, except as to the signature, is clearly described in the mortgage.
2. Ch. 122, Laws of 1903 (sec. 2316c, Stats.), refers to a *hostile* taking and sale of property under a chattel mortgage, and is inapplicable where the mortgagor assented to the sale.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an action for the recovery of damages for the unlawful taking and converting by defendants to their own use of a roan mare alleged to be the property of the plaintiff and of the value of $150.

It is alleged that prior to September 16, 1910, the plaintiff pastured this mare on his brother *Albert Lierman's* farm in Sheboygan county and that defendants on that day wrongfully took possession of her and converted her to their own use, to the plaintiff's damage in the sum of $225.

It appears that *Thomas O'Hara* and Adam Trester at the time of the transactions here involved had been duly elected and were acting as justices of the peace of Sheboygan county; that *A. A. Hoehne* was the duly elected sheriff of this county; that *George Goodel* was the undersheriff; and that *E. H. Haehnke* was acting as a deputy sheriff.

In May, 1908, one Max Neitzke of the city of Milwaukee was indebted to one Fred Steinmueller of the same place in the sum of $690.10. On May 3, 1908, Neitzke, through his attorney, pursuant to an agreement of the parties, delivered

to Steinmueller a paper writing in the form of a promissory note stating that Neitzke was indebted to Steinmueller $690.10, and a chattel mortgage. The mortgage was properly executed and signed by Neitzke, covering among other property the roan mare here in question; but the writing in form of a promissory note was not signed. The mortgage was duly recorded in the office of the city clerk of the city of Milwaukee May 29, 1908, and an affidavit of the renewal thereof was filed on the 2d day of May, 1910, in the city clerk's office.

On March 31, 1910, Neitzke by bill of sale purported to convey the unincumbered title to the mare in question to the plaintiff, *Ernst Lierman,* and received a credit from plaintiff of $100 on a judgment plaintiff had against him. This bill of sale was not recorded. Two days thereafter plaintiff sent the mare to the farm of his brother *Albert Lierman* at Random Lake, where she was kept until September 16, 1910. On this day Steinmueller, the mortgagee, and *Haehnke,* as deputy sheriff, took the mare from *Albert Lierman's* possession under a proceeding in replevin issued by *O'Hara* as justice of the peace. On September 20th, three days before the return day of the replevin proceeding under which *Haehnke* claimed to hold the mare, Steinmueller demanded possession of her from him upon the ground that the replevin proceeding before Justice *O'Hara,* which was dismissed on September 23d for want of prosecution, was void. *Haehnke* refused to surrender possession of the mare.

On September 22d, upon Steinmueller's application, a warrant of replevin was issued by Justice Adam Trester to obtain possession of the mare from *Haehnke. Goodel* under this writ took possession of the mare. On September 26th *Albert Lierman* became a party to this action, claiming a lien for the feed and care of the mare in the sum of $100. He appeared by Kanneberg & Heilbron, attorneys, who also represented the defendant *Haehnke, Lierman* claiming and al-

leging that he was entitled to possession of the mare under the right of lien as above stated and the defendant *Haehnke* alleging that he was entitled to possession of the mare under the writ of replevin issued by Justice *O'Hara*. After trial of this action judgment was entered awarding possession of the mare to the plaintiff Steinmueller as the mortgagee of Neitzke. An appeal was taken from this judgment to the circuit court for Sheboygan county, where the action is still pending. The foregoing are the material facts relied on by the defendants to justify their taking possession of the mare and upon which they deny any liability to the plaintiff for a wrongful taking and conversion of her.

The instant action was tried in circuit court to a jury, who rendered a special verdict finding, in substance, (1) that Steinmueller did not make demand for the mare from *Albert Lierman* prior to commencing suit before Justice *O'Hara;* (2) that the purported promissory note and the chattel mortgage were not delivered by Kinney to Steinmueller without Neitzke's consent; (3) that the mare was worth $150; (4) that plaintiff's damages for such taking and keeping of the mare from and after September 16, 1910, amounted to $30.18. The court awarded judgment dismissing the plaintiff's complaint with costs. This is an appeal from such judgment.

The cause was submitted for the appellant on the brief of *Kanneberg, Cochems & Wolfe* and *H. H. Heilbron,* and for the respondents *O'Hara, Haehnke,* and *Hoehne* on that of *Lorenz & Lorenz.*

SIEBECKER, J. The main contention of the plaintiff is that the court erred in holding that the mortgage from Neitzke to Steinmueller was a valid instrument. The mortgage was properly executed and recorded and states that it was given to secure an alleged promissory note of $690.10. A written paper in the form of a promissory note for this amount and

payable to Fred Steinmueller had been drawn, but was not signed by Max Neitzke. It, together with a chattel mortgage, was delivered to Steinmueller, who accepted them without inspection in the belief that they were properly executed and that they expressed the contracts between himself and Neitzke, his debtor. It is now claimed by the plaintiff that the omission to sign this intended promissory note renders the mortgage void and of no effect, and that the defendants, when they took possession of the mare in proceedings based on this mortgage, had no authority or right so to take her and hence were guilty of a wrongful taking and conversion of plaintiff's property. The case of *Follett v. Heath,* 15 Wis. 601, is relied upon for support of this claim. As stated in *Paine v. Benton,* 32 Wis. 491, 495:

"The rule of *Follett v. Heath* is not to be extended beyond the facts in the case then before the court. The facts there were, that the mortgage gave a totally false description of the note intended to be secured, or which was so claimed. The description was false and foreign in every particular, save that the names of the parties to the note, maker and payee, were correctly given. The note described differed, in amount, date and time of payment, altogether from that held by the mortgagee."

In the instant case there is no such infirmity in the transaction between the parties. There is no dispute but that the mortgage correctly describes the written paper except as to the signature, and correctly states the amount of the debt due Steinmueller from Neitzke and the terms and conditions agreed on by the parties for payment of the debt. It is manifest that Neitzke, through inadvertence, omitted to sign this intended promissory note as the parties had arranged, and that on this account it never became a promissory note. It is, however, a correct memorandum of the amount of Neitzke's indebtedness to Steinmueller and expresses the terms and conditions agreed upon by the parties for its payment, and corresponds with the description of it in the mortgage, ex-

cept that it is not signed. From the undisputed facts in the case it is obvious that, although the writing is not an executed promissory note corresponding with the provisions of the mortgage, the mortgagor intended to secure his indebtedness to the mortgagee, as stated in the mortgage and the unsigned writing which refers to the existing indebtedness intended to be secured. The written memorandum can properly be treated as evidence of the debt which the mortgage was given to secure. Under the facts and circumstances the omission of Neitzke to sign this paper did not mislead any person. The conditions in the mortgage and the contents of this writing expressing the terms of payment of this debt correspond with sufficient accuracy to show the indebtedness which the parties sought to cover and secure by the mortgage. The discrepancy may be disregarded as not necessarily fatal to the validity of the mortgage. *Weber v. Illing,* 66 Wis. 79, 27 N. W. 834; *Rock v. Collins,* 99 Wis. 630, 637, 75 N. W. 426; *Lee v. Fletcher,* 46 Minn. 49, 48 N. W. 456.

It is urged that the mortgage was duly paid and canceled before Steinmueller took any steps to get possession of the mare, because he failed to file an affidavit, as required by ch. 122, Laws of 1903, within ten days after selling another horse covered by the mortgage. The evidence shows that the mortgagor assented to have this horse sold under the mortgage and the proceeds applied in part payment of his debt. Under such circumstances the mortgagee is not required to file the affidavit specified in this statute. *Hammel v. Cairnes,* 129 Wis. 125, 107 N. W. 1089; *F. A. Patrick & Co. v. Deschamp,* 145 Wis. 224, 129 N. W. 1096.

We find no reversible error in the record.

By the Court.—Judgment affirmed.

FRANK A. GRAHAM ICE COMPANY, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

March 12—April 8, 1913.

Railroads: Regulation of rates: Constitutional law: Railroad commission: Schedule rates, when lawful: Relief against excessive charges: Exclusive remedy: Common-law action not preserved: Jury trial: Vested rights.

1. The legislature has power to fix the rates to be charged by railway companies, either directly or by delegation of authority to an appropriate agency, provided the rates fixed are such as to afford reasonable compensation for the services rendered.
2. The remedy provided by secs. 1797—37*m* (Laws of 1907, ch. 582), 1797—12*a* (Laws of 1909, ch. 271), and ch. 362, Laws of 1905, for the fixing of freight charges and for relief against excessive charges was intended by the legislature to be exclusive, and full power in respect to these matters is lodged in the railroad commission.
3. Under these statutes, the rates printed in the schedules made and filed by a railway company conformably to law constitute the lawful rates until changed in the manner provided, on application to the commission, and the railway company can charge neither more nor less without violating the law. In a common-law action, therefore, to recover for excessive rates, the courts cannot pronounce such schedule rates unlawful.
4. In view of other parts of ch. 362, Laws of 1905, it is not considered that sec. 34 of that act was intended by the legislature to preserve the common-law remedy to the extent of allowing the schedule rates to be attacked in a common-law action.
5. Secs. 1797—37*m* and 1797—12*a*, while they provide for the recovery by a shipper, in certain cases, of part of the money paid although not in excess of schedule rates, do not contemplate that any reparation can be made until application has first been made to the railroad commission under sec. 12, ch. 362, Laws of 1905, and the schedule rates have been found unreasonable or unjustly discriminatory.
6. No one has a vested right to the continuance of a common-law remedy for the redress of future wrongs; hence, secs. 1797—37*m* and 1797—12*a* are not unconstitutional because denying the right of trial by jury. Besides, a remedy by action against the railroad commission is preserved in favor of any aggrieved

party, so that the rights of all parties are well guarded under the law.

7. Where the rates paid by a shipper are the schedule and lawful rates at the time when paid, the fact that another shipper afterwards obtains a reduction of rates in a proceeding before the railroad commission, even in the same district, will not bind the railway company in a common-law action by the first shipper to recover for excessive charges, nor sustain such action.

APPEALS from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

This action was brought to recover $2,416.71, alleged excessive freight charges charged plaintiff by defendant on shipments of ice from points in Wisconsin on the line of defendant's railroad between August 20, 1906, and September 26, 1909. The complaint charges in effect that the respondent operated a line of its railroad from the following points in Wisconsin, namely, Merton, North Lake, Random Lake, Pewaukee, Burlington, and Waukesha, to certain freight yards located in Milwaukee, Wisconsin, known as the Chestnut and Fowler street yards of defendant; that the distance from Merton to the Chestnut street yards is 28 miles; from North Lake to the Chestnut street yards, 32 miles; from Random Lake to the Chestnut street yards, 38.5 miles; from Pewaukee to the Chestnut street yards, 26.6 miles; from Burlington to the Chestnut street yards, 50.6 miles; from Waukesha to the Chestnut street yards, 28.6 miles; that the distance from Merton to the Fowler street yards is 31 miles; from North Lake to the Fowler street yards, 35 miles; from Random Lake to the Fowler street yards, 41.5 miles; from Burlington to the Fowler street yards, 43.2 miles; that at the times mentioned in the complaint the conditions and expense of transporting ice in carload lots from each of said places to said Chestnut street yards over the defendant's railroad were substantially the same as the conditions, cost, and expense of transporting ice in carload lots to the Fowler street yards; that during the times mentioned in the complaint the defend-

ant charged plaintiff three cents per hundred pounds of ice shipped over its railroad from the stations named to the Chestnut street yards, and that during said times defendant charged and accepted from parties other than plaintiff two and one-half cents per hundred pounds of ice transported in carload lots over its line from said places to the Fowler street yards, notwithstanding that the distance from said places to said Fowler street yards is from 3 to 7.4 miles greater than from said places to said Chestnut street yards.

That on June 12, 1909, one John Schneider, doing business as Schneider Ice Company in the city of Milwaukee, made complaint to the railroad commission of Wisconsin in accordance with sec. 1797—37*m*, Stats., charging that the rate of three cents per hundred pounds of ice charged by defendant for transporting ice from Merton to the Chestnut street yards over defendant's railroad was unusual, exorbitant, and discriminatory in comparison with rates charged between other places in the vicinity of Merton to said Fowler street yards. That, after hearing, the railroad commission decided that a charge of three cents per hundred pounds from Merton to the Chestnut street yards was discriminatory and unreasonably high, and ordered discontinuance of the three-cent rate and a substitution of a two and one-half cent rate per hundred pounds, and in pursuance of said order the defendant on the 24th day of September, 1909, discontinued said three-cent rate and substituted and ever since has continued a two and one-half cent rate per hundred pounds for ice in carload lots. That in respect to Chestnut street freight yards, all of the places mentioned in the complaint are in said district and the conditions and expense of transporting ice in carload lots from each of said places to the Chestnut street freight yards were the same, and in fixing the rate said places were regarded in the same freight district.

That the plaintiff demanded a return of the amount of alleged excessive charges, namely, $2,416.71, and the defend-

ant refused to pay the same, for which sum judgment was demanded with costs.

The defendant answered and as a second and separate defense set up the following answer:

"1. That during all of the times mentioned in the complaint it was in every respect complying with ch. 362, Laws of Wisconsin of 1905, relating to the making and filing of copies of all schedules of rates, fares, and charges for the transportation of passengers and property and every service in connection therewith; that the rates charged the plaintiff for carrying the property mentioned in the complaint were those fixed by its schedule of rates in force between the points in question at the time each shipment was made, and that under said chapter it was unlawful for defendant to charge, collect, demand, or receive a greater or less compensation for the transportation of said property than was specified in the printed schedule. That by and under ch. 582 of Laws of Wisconsin of 1907, published in the Laws of Wisconsin for that year as sec. 1797—37*m*, it was provided in substance that within six months after the delivery of any shipment of freight at destination any person aggrieved might complain to the railroad commission of Wisconsin that the charge exacted for the transportation of such freight between points in Wisconsin is unusual and exorbitant; that thereupon the commission should hear and decide such complaint upon the merits and fix the proper charge if less than the rate charged and paid; that the carrier might refund the excess, and that if it did not an action might be brought against it to recover the same; that any refund made under the ruling of the commission should not render the carrier liable for any penalty or forfeiture or subject to prosecution; that by and under ch. 271, Laws of Wisconsin of 1909, published as such in the Laws of Wisconsin for that year as sec. 1797—12*a*, it was provided in substance that within thirty days from and after June 4, 1909, any person aggrieved by freight charges paid within five years immediately preceding July 12, 1907, for the transportation of freight between points in Wisconsin, might complain to the railroad commission of Wisconsin in respect to such charges; that the commission should hear and decide the complaint upon the merits, and, if the facts warrant it, fix the proper charge, if less than the amount charged,

and that the carrier might refund the excess and should not be liable to any penalty or forfeiture or subject to prosecution on account of such refund.

"2. It alleges, upon information and belief, that the plaintiff did not, at any time before the commencement of this action, complain to the railroad commission of Wisconsin in respect to the freight charges mentioned in the complaint, or any of them, and that no order in favor of the plaintiff in respect to such charges has been made by the said commission.

"3. That all of the shipments alleged in the complaint were delivered at destination prior to September 27, 1909; that the action was commenced December 19, 1910, and more than one year after the date of the last shipment and payment mentioned and described in the complaint."

The plaintiff demurred to this separate defense for want of facts sufficient to constitute a defense. From the order of the court overruling the demurrer this appeal was taken.

For the appellant there was a brief by *Kronshage, Hannan & McMillan,* and oral argument by *T. J. Hannan.* They cited, *inter alia, Parker v. G. W. R. Co.* 7 M. & G. 253, 49 Eng. Com. Law, 253; *Smith v. C. & N. W. R. Co.* 49 Wis. 443, 5 N. W. 240; *Graham v. C., M. & St. P. R. Co.* 53 Wis. 473, 10 N. W. 609; *Madison v. Madison G. & E. Co.* 129 Wis. 249, 265, 108 N. W. 65; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905; *Southern Pac. Co. v. Colorado F. & I. Co.* 101 Fed. 779; Barnes, Interstate Transportation, 605–608; Const. U. S. art. VII; Const. Wis. art. I, secs. 5, 9; Cooley, Const. Lim. 266, 267; *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226, 17 Sup. Ct. 581; *In re Eldred,* 46 Wis. 530, 1 N. W. 175.

For the respondent there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Van Alstine.* They cited *Van Patten v. C., M. & St. P. R. Co.* 81 Fed. 545; *Texas & P. R. Co. v. Abilene C. O. Co.* 204 U. S. 426, 27 Sup. Ct. 350; *Southern R. Co. v. Tift,* 206 U. S. 428, 27 Sup. Ct. 709; *Baltimore & O. R. Co. v. U. S.* 215 U. S. 481, 30 Sup. Ct. 164; *Robinson v. B. & O. R. Co.* 222 U. S. 506,

32 Sup. Ct. 114; *Morrisdale C. Co. v. Penn. R. Co.* 176 Fed. 748; *A. J. Phillips Co. v. G. T. W. R. Co.* 195 Fed. 12, 13; *Second Employers' Liability Cases* (*Mondou v. N. Y., N. H. & H. R. Co.*) 223 U. S. 1, 50, 32 Sup. Ct. 169; *Nat. P. Co. v. C. & N. W. R. Co.* 200 Fed. 185.

KERWIN, J. The contentions of counsel for appellant here are grounded upon four principal propositions, namely: (1) The common-law right to recover for excessive freight rates is still in force in Wisconsin. (2) Sec. 1798, Stats., is declaratory of the common-law right to recover for excessive freight rates. (3) The remedy provided by secs. 1797—37*m* (Laws of 1907, ch. 582) and 1797—12*a* (Laws of 1909, ch. 271) for the recovery of excessive freight rates is concurrent and alternative and not an exclusive remedy. (4) If the remedy afforded by secs. 1797—37*m*, 1797—12*a*, Stats., and sec. 16, ch. 362, Laws of 1905, is exclusive, said sections are unconstitutional, because they deny the right of trial by jury guaranteed by the federal and state constitutions.

There is no doubt but that the fixing of rates to be charged by railroad companies may be controlled by the legislature within constitutional bounds. True, the question of whether rates fixed are confiscatory or within constitutional limitations is a judicial question. *Madison v. Madison G. & E. Co.* 129 Wis. 249, 108 N. W. 65; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905. But the legislature has power to fix rates either directly or by delegation of authority to an appropriate agency, provided the rates fixed are such as to afford reasonable compensation for the services rendered. *Madison v. Madison G. & E. Co., supra; Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm., supra.*

It is plain from the statutes upon the subject that the legislature intended to and did provide an exclusive remedy for the fixing of freight charges. Ch. 362, Laws of 1905, created the railroad commission. Sec. 2 thereof defines the term

"railroad" as used in the act, and the act applies to transportation of passengers and property between points in Wisconsin, and to the receiving, switching, delivering, and handling of property and charges connected therewith. Sec. 3 provides that all charges shall be reasonable and just and prohibits unreasonable and unjust charges. Sec. 4 makes it the duty of the railroad companies to establish and file with the railroad commission schedules showing all rates, fares, and charges and to keep such schedules open to public inspection, and prohibits any change in rates, fares, or charges except upon notice to the commission. It requires that all changes shall be plainly indicated upon existing schedules or by filing new ones, and, when any change shall have been made, notice thereof shall be posted in all stations. Secs. 5, 6, 7, 8, 9, 10, and 11 inclusive provide for joint and commodity rates, classification of freight, reduced rates and free transportation, depots, distribution of cars, and interchange of traffic by carriers. Secs. 12, 13, 14, 15, and 16 inclusive treat of complaints and investigations, power to hear and determine the same, attendance of witnesses, taking of depositions, substitution and enforcement of rates, and orders carrying the decision of the commission into effect. Secs. 17 to 31 inclusive provide, among other things, rules of evidence and practice, power of the commission to inquire into the management of railroad companies, investigate rates, prohibit discriminatory preferences and rebates, provide penalties for violations of the act, and investigation of claims.

Part of sec. 4 reads as follows:

"It shall be unlawful for any railroad to charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property or for any service in connection therewith than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, and the rates, fares and charges named therein shall be the lawful rates, fares and charges until the same are changed as herein provided."

Part of sec. 14 is as follows:

"Whenever, upon an investigation made under the provisions of this act, the commission shall find any existing rate or rates, fares, charges or classifications, or any joint rate or rates, or any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, are unreasonable or unjustly discriminatory, or any service is inadequate, it shall determine and by order fix a reasonable rate, fare, charge, classification or joint rate to be imposed, observed and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory, and it shall determine and by order fix a reasonable regulation, practice or service to be imposed, observed and followed in the future, in lieu of that found to be unreasonable or unjustly discriminatory or inadequate, as the case may be."

Sec. 25. "If any railroad shall do or cause to be done or permit to be done any matter, act or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing required to be done by it, such railroad shall be liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation; provided, that any recovery as in this section provided shall in no manner affect a recovery by the state of the penalty prescribed for such violation."

Sec. 34. "This act shall not have the effect to release or waive any right of action by the state or by any person for any right, penalty or forfeiture which may have arisen or which may hereafter arise under any law of this state; and all penalties and forfeitures accruing under this act shall be cumulative and a suit for, and recovery of one, shall not be a bar to the recovery of any other penalty."

Sec. 37 is as follows: "So much of section 128 of the Statutes of 1898 as provides for the election of a railroad commissioner, also sections 1793 and 1803 of such statutes, and all other acts and parts of acts conflicting with the provisions of this act are hereby repealed in so far as they are inconsistent herewith."

Sec. 1798, Stats. (1898), prohibits discrimination in rates, and provides that no railroad company shall "charge,

demand or receive from any person, company or corporation an unreasonable price for the transportation of persons or property, or for the hauling or storage of freight." And further provides in substance that any railroad corporation which shall violate any of the provisions of the act shall be liable to the person aggrieved in three times the actual damages sustained besides costs.

The original act did not expressly make provision for reparation in cases where the rates were held excessive by the commission, and provision was made therefor by ch. 582, Laws of 1907 (sec. 1797—37*m*), and ch. 271, Laws of 1909 (sec. 1797—12*a*).

Ch. 582, Laws of 1907, reads:

"Within six months after the delivery of any shipment of freight at destination any person aggrieved may complain to the commission that the charge exacted for the transportation of such freight between points in Wisconsin is unusual or exorbitant, and thereupon the commission shall have power to investigate such complaint, and to hear the same and to decide upon the merits thereof, in the manner provided by section 12, chapter 362, Laws of 1905. If upon such hearing the commission shall decide that the rate or charge exacted is unusual or exorbitant it shall find, what in its judgment, would have been a reasonable rate or charge for the service complained of. If the rate or charge so found shall be less than the charge exacted the carrier shall have the right to refund to the person paying such charge the amount so found to be excessive. In case of the refusal of the carrier to make such refund, the party aggrieved thereby may maintain an action in the courts of this state, to recover the amount of such excessive charge as found by said commission, and in the trial thereof the findings of the commission shall be *prima facie* evidence of the truth of the facts found by it and no carrier shall be permitted to avail itself of the defense in such action that the shipment involved was in fact made on the published tariff rate in force at the time such shipment was made, but no carrier making a refund upon the order of the commission or pursuant to a judgment of court as herein provided, shall be liable for any penalty or forfeiture, or subject

to any prosecution under the laws of this state, on account of making such refund."

Ch. 271, Laws of 1909, reads:

"Section 1797—12*a*. Within thirty days from and after the passage of this act, any person aggrieved may complain to the railroad commission of Wisconsin that the charge exacted for the transportation of any property between points in this state, which property was delivered at destination within the period of five years immediately preceding July 12, 1907, or for any service in connection therewith, or that any charge exacted for the storage of any property within such period, or that any car-service or demurrage charge exacted within such period is erroneous, unusual, or exorbitant; and thereupon the said commission shall have power to investigate such complaint, and to hear the same, and to decide upon the merits thereof in the manner provided by section 12, chapter 362, Laws of 1905. If upon such hearing the commission shall decide that the rate or charge exacted is erroneous, unusual, or exorbitant, it shall find what in its judgment would have been a correct rate or charge for the service complained of, and if the rate or charge so found shall be less than the charge exacted, the carrier shall have the right to refund to the person paying such charge the amount so found to be erroneous, unusual, or exorbitant. No carrier making a refund upon the order of the commission as herein provided shall be liable for any penalty or forfeiture or subject to any prosecution under the laws of this state on account of making such refund."

The contention of counsel for appellant that the remedy provided by secs. 1797—37*m* and 1797—12*a* is concurrent, alternative, and not exclusive, cannot be sustained. The statutes referred to show that the whole matter of fixing rates and the remedies for excessive charges is lodged with the railroad commission. The rates in the schedule made and filed constitute the lawful rates until changed in the manner provided, on application to the commission. The schedule rates being by the express terms of the statute the lawful rates, the railroad companies have not authority to charge different rates. They are prohibited by statute from so doing. They

can charge neither more nor less than such rates. In a common-law action, therefore, to recover for excessive rates the courts cannot say that the schedule rates are unlawful rates. This obviously is necessary in order to preserve equality and uniformity in rates and the carrying out of the system established by the legislature in creating the railroad commission. *Texas & P. R. Co. v. Abilene C. O. Co.* 204 U. S. 426, 27 Sup. Ct. 350. True, that case arose out of the Interstate Commerce Act, but the reasoning of the court is quite in point here. See, also, *Southern R. Co. v. Tift,* 206 U. S. 428, 27 Sup. Ct. 709; *Baltimore & O. R. Co. v. U. S.* 215 U. S. 481, 30 Sup. Ct. 164; *Robinson v. B. & O. R. Co.* 222 U. S. 506, 32 Sup. Ct. 114.

It is insisted that sec. 34, ch. 362, Laws of 1905, hereinbefore set out, was intended by the legislature to preserve the common-law remedy. It is true that this provision is quite broad, but in view of other parts of the railroad commission law heretofore referred to we are convinced that it was not intended by the legislature to save the common-law remedy to the extent of allowing the schedule rate to be attacked in a common-law action. This, we think, appears clearly from the legislation on the subject heretofore referred to.

It is insisted, however, by counsel for appellant that sec. 1797—37*m* (ch. 582, Laws of 1907) and sec. 1797—12*a* (ch. 271, Laws of 1909) contemplate that the shipper can recover in a common-law action a part of the money paid, although not in excess of schedule rates. These statutes, however, do not provide or contemplate that any reparation can be made until the railroad commission has passed upon the question as to whether the schedule rates are excessive. They provide expressly for proceeding before the commission in the manner specified in sec. 12, ch. 362, Laws of 1905, and clearly show that the schedule rates are the lawful rates until the question is first passed upon in a proceeding before the commission in the manner provided.

Sec. 12, ch. 362, Laws of 1905, among other things, pro-

vides that upon complaint to the railroad commission that any rate or rates are in any respect unreasonable or unjustly discriminatory the commission may proceed to investigate as provided in the act, and if upon such investigation the rate or rates shall be found to be unreasonable or unjustly discriminatory, the commission shall have power to fix and order substituted therefor such rate or rates as it shall have determined to be just and reasonable, and it shall be charged and followed in the future.

Sec. 16 of this chapter provides, among other things, that any railroad or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, may commence an action in the circuit court against the commission as defendant, to vacate and set aside any such order on the ground that the rate or rates are unlawful or unreasonable; and regulates the proceedings in such action.

In the case at bar there was no application by appellant to the railroad commission to change the schedule rates, which rates are claimed to be excessive. The schedule rates must therefore, in the present action, be regarded as the lawful rates. *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905.

Sec. 1797—12*a*, being ch. 271, Laws of 1909, is attacked on the ground that it is a statute of limitation and is unreasonably short under the doctrine laid down in *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301, 306, 78 N. W. 412, and other cases in this court. But in our view of the case it is unnecessary to consider this point. The plaintiff had no standing in any court for reparation until it first applied to the railroad commission for relief in the manner provided by the statutes.

It is further urged by counsel for appellant that secs. 1797—37*m* and 1797—12*a* are unconstitutional because they deny the right of trial by jury, guaranteed by the state and federal constitutions. This contention is unsound. No

one has a vested right to the continuance of a common-law remedy to redress future wrongs. In *Second Employers' Liability Cases* (*Mondou v. N. Y., N. H. & H. R. Co.*) 223 U. S. 1, 32 Sup. Ct. 169, at page 50 the court said:

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." Citing *Munn v. Illinois,* 94 U. S. 113, 134; *Martin v. P. & L. E. R. Co.* 203 U. S. 284, 294, 27 Sup. Ct. 100; *The Lottawanna,* 21 Wall. 558, 577; *Western Union T. Co. v. Commercial M. Co.* 218 U. S. 406, 417, 31 Sup. Ct. 59.

Moreover, as before observed, the legislature has the right, within constitutional bounds, to fix rates, and a remedy by action against the railroad commission is preserved in favor of any aggrieved party, so the rights of all parties are well guarded under the law. Ch. 362, Laws of 1905; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905.

It is further contended that because one Schneider, doing business under the name of Schneider Ice Company, complained to the railroad commission in accordance with sec. 1797—37*m,* Stats., and after a hearing was had in accordance with sec. 12, ch. 362, Laws of 1905, obtained a reduction of the rate in the future from Merton to the Chestnut street yards over defendant's railroad from three cents to two and one-half cents per hundred pounds of ice, which rate went into effect September 24, 1909, the appellant is entitled to recover one half cent per hundred pounds excessive rate. This contention cannot be sustained. The effect of such a rule would be to bind the railroad company without its day

in court. The rates charged the appellant were the schedule and lawful rates when charged, and the fact that a stranger had obtained a reduction of rates in a proceeding by him before the railroad commission at a later date, even in the same district, cannot bind the railroad in a proceeding or action by another shipper for reparation on account of excessive charges. This doctrine has been laid down respecting the interstate commerce commission on complaint of a shipper. *Nat. P. Co. v. C. & N. W. R. Co.* 200 Fed. 185, and cases there cited.

It follows that the order below must be affirmed.

By the Court.—The order of the court below is affirmed.

RUCK, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

March 12—April 8, 1913.

Master and servant: Injury: Employers' Liability Act: Railroads: Interstate commerce: When servant is employed therein: Shop and office employees: Contributory negligence: Simple tools: Constitutional law: Foreign laws: Evidence.

1. As regards appliances and instrumentalities used by a common carrier in the business of transportation, it is the use to which it is put at the time, rather than the nature of the instrumentality itself, which determines whether or not it is employed in interstate commerce.
2. Where such an instrumentality (in this case a boiler constituting part of the equipment of a wrecking train), at the time repairs are being made upon it, is not being used to facilitate interstate commerce, but is being repaired to make it ready for either interstate or intrastate use as occasion may require in the future, an employee engaged in making such repairs is not employed in interstate commerce within the meaning of the federal Employers' Liability Act.
3. The words "employed by such carrier in such commerce," as used in said act, mean employed directly in transportation or in some act directly facilitating transportation.

4. It is within the power of a state to regulate the relation of master and servant, where both are within the jurisdiction of the state and the contract of employment is made therein, and to fix (as is done by sec. 1816, Stats.) the liabilities as between them with respect to negligent injuries arising out of or incident to such contract of employment, whether occurring within or without the state, provided the employee so injured without the state is there on the business of the employer and pursuant to the contract made in this state.
5. "Employees working in shops and offices," to whom the provisions of sec. 1816, Stats., are declared not to be applicable, include all of the class employed for shop or office work, although outside of the shop or office at the time of the injury.
6. When the decisions of another state are offered in evidence to prove the law of that state, the point decided is what is proven as law, and not the matters advanced by way of argument or illustration.
7. Plaintiff, a boiler maker, and two other employees of defendant were engaged in repairing a boiler at night, and for the purpose of cutting rivets were using a steel punch having a handle like a hammer, and a sledge of ten or twelve pounds weight. Plaintiff first handled the sledge and then changed work with one of the others and held a light some two or three feet away. The head of the punch was somewhat battered, and in using it a burr flew off and struck plaintiff in the eye. The jury found that he did not know of the defects in the punch and that he was not guilty of contributory negligence. *Held*, that while the punch was simple in form, it was not simple with reference to its resisting qualities or with reference to the results of using it with the end battered or burred; and it could not, under the circumstances stated, be said to be a simple tool.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Van Alstine.*

For the respondent there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Walmsley.*

TIMLIN, J. The defendant is a railroad corporation of Wisconsin, and the plaintiff was in its employment as a

boiler maker at its shops at Milwaukee, Wisconsin. Obedient to instructions from defendant, the plaintiff went to Galewood, Illinois, for the purpose of assisting in repairing a boiler and with intention to return to his work at Milwaukee when the Galewood task was completed. This boiler had been attached to and used in operating a derrick or hoist fastened on a flat car, and this car so equipped was used as one car of a wrecking train. This car was generally housed in one of the stalls of the roundhouse at Galewood, ready for service on short notice, and there is always an engine near by with which to take the wrecking train to its destination. The wrecking train consisted of this locomotive, one or more flat cars, this hoist or derrick car, and a bunk car. A bunk car is like an ordinary box freight car containing beds or bunks, a stove, and other furnishings. This wrecking train carried also various appliances necessary and convenient for salvage of passengers or goods, removing wreckage, replacing derailed cars or engines, etc. The wrecking train was subject to orders and was used mostly in the state of Illinois, and, when required by reason of a wreck, also in the states of Iowa and Wisconsin, depending of course upon the place of disaster. The men constituting the wrecking crew sleep in the bunk car and frequently remain there three or four days at a time. At the time plaintiff was sent to Galewood to repair this boiler the boiler had been taken off the flat car and lay near it in the roundhouse. Plaintiff with other boiler makers went to work on this boiler cutting off rivet heads. They used for this purpose a sledge and a hammer-shaped implement called a punch or drift hammer, being a cross-head four or five inches long, of about two inches diameter on the large end and round, and of three fourths of an inch diameter at the small end, having a handle like a hammer. The small end of this punch was placed against the rivet, one man holding the handle while another struck with a sledge on the larger end of the punch. After the plaintiff used the sledge awhile

another workman took the sledge, and while a third was holding the punch the plaintiff held an electric light near by, the work being done at night. At one of the sledge strokes a piece of steel flew from the punch and struck the plaintiff in the right eye, causing the loss of that eye. The punch was discovered to be burred or rolled back on the large end, and a piece of steel was found which was considered to be that which struck plaintiff in the eye, and it fitted into a cavity or break in this burr. Experts testified that continued striking of a punch causes the steel to harden, crystallizes it, makes it brittle, and has a tendency to cause the breaking of the burrs, the pieces of which sometimes fly with great force; that when such a tool commences to show signs of burring it should be reforged or reground and the burred head removed and the end of the tool brought down to its proper size; that a tool of this kind should not burr at all.

A special verdict was submitted whereby the jury found that the punch was defective and this was due to a want of ordinary care on the part of defendant, and was the proximate cause of plaintiff's injury. The plaintiff at the time of the accident did not know that there were burrs on the head of the punch nor was he guilty of contributory negligence, and his damages were $4,000. On this verdict the plaintiff had judgment.

The complaint in its first count or cause of action seemed to proceed on a common-law liability, on its second count or cause of action expressly under sec. 1816, Stats., and in the third count or cause of action expressly under the Employers' Liability Act of Congress. There was an oral objection to the reception of any evidence under each of the several causes of action, which was overruled. The third cause of action was added by amendment against the exception and objection of defendant. The defendant moved for a nonsuit on the ground that the proof did not bring the case within the federal Liability Act and the motion was denied.

The appellant contends in this court that neither the pleading nor the evidence in the case warrants a recovery under the federal Employers' Liability Act of April 22, 1908 (35 U. S. Stats. at Large, 65, ch. 149). The portion of that statute relevant to this inquiry is contained in sec. 1 and is as follows:

"Every common carrier by railroad while engaging in commerce between any of the several states or territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The statute applies with larger scope to the carrier than to the employee. The former is brought within the purview of the statute if the described injury occurs while, *i. e.* during the time, it is engaging in interstate commerce. The defendant was within the purview of this statute. The question here is, Was the plaintiff at the time of his injury employed in interstate commerce? Commerce includes sale or barter, with numerous incidents thereof, communication, also transportation of passengers or goods. That constituent or incident of commerce in which a common carrier is engaged as such is transportation, and this statute relates, therefore, to employment in transportation of goods or passengers. Most appliances or instrumentalities used in transportation are of such nature that they may be used in intrastate or domestic commerce or in interstate commerce, and are put to one use or the other at the direction of the possessor, as his interest or duty may require. When put to a use directly facilitating interstate commerce, they are instrumentalities of that commerce. It follows that the use to which the appliance is put rather than the nature of the appliance must be considered. Otherwise all railroad cars would be at all times instrumen-

talities of interstate commerce no matter how used. These appliances require construction and repair. The construction or repair is performed to fit the appliance for either use. A foundry making or repairing car wheels which are to be put on cars which may be used in either kind of commerce could not correctly be said to be engaged in interstate commerce nor its employees said to be employed in such commerce. It could hardly be said that a steamfitter who constructs or repairs a heater for a passenger car when the car is not *en route,* or a railroad employee repairing cars at its repair shops when the cars are not *en route,* is employed in interstate commerce within the meaning of this statute. The words "employed by such carrier in such commerce" must mean employed directly in transportation or in some act directly facilitating transportation. A box company manufacturing or repairing boxes for packing goods which may be used in either kind of commerce is not engaged in interstate commerce nor are its employees employed in interstate commerce. At the same time, if an interstate train or car stops temporarily *en route* for repairs necessary to enable it to proceed on its interstate journey and it is intended that the car should so proceed when the repairs are made, the employee making such repairs would be employed in interstate commerce. This, I think, is what was decided in case numbers 289 and 290, *Second Employers' Liability Cases,* 223 U. S. 1, 32 Sup. Ct. 169. But where the thing repaired is itself a mere appliance, useful and used in either kind of commerce as occasion might require, like a handcar, a wheelbarrow, a capstan or jackscrew or a shovel, and this appliance at the time the repairs thereon are made is not being used to facilitate interstate commerce, but is being repaired to make it ready for either use in the future as occasion may require, the employee engaged in making such repair is not employed in interstate commerce. Any other rule would bring within this statute almost every conceivable case of construction or repair

of transportation appliances. The Federal Reporter cases on this subject display more than the usual amount of conflict and contradiction, and in such case we can do no more than follow those which appear to us to rest on the better reason, as we did in *Pope v. Title G. & S. Co.* 152 Wis. 611, 140 N. W. 348. See *Pederson v. D., L. & W. R. Co.* 197 Fed. 537; *Taylor v. Southern R. Co.* 178 Fed. 380; *Zikos v. Oregon R. & N. Co.* 179 Fed. 893; *Colasurdo v. Central R. of N. J.* 180 Fed. 832; *Northern Pac. R. Co. v. Maerkl,* 198 Fed. 1.

The decision of the supreme court of the United States in *Southern R. Co. v. U. S.* 222 U. S. 20, 32 Sup. Ct. 2, to the effect that the federal statute requiring the use of a certain safety appliance included cars adapted for both intrastate and interstate commerce and used interchangeably in moving both kinds of traffic, was thought in *Northern Pac. R. Co. v. Maerkl, supra,* to have some bearing upon the interpretation of this Employers' Liability Act. But it does not follow at all that an employee engaged in repairing an appliance which is adapted for and may be used in facilitating either kind of traffic is employed by the carrier in interstate commerce merely because a statute requiring a certain car equipment applies to cars which are used interchangeably in moving intrastate and interstate shipments. The fact that such car is used at all in the last mentioned traffic brings it within the statute relative to equipment. *Colasurdo v. Central R. of N. J.* 180 Fed. 832 (*S. C.* on appeal, 192 Fed. 901), is, I think, correctly decided if we approach the question from the viewpoint of the learned district judge, namely, that the statute includes all such employees as Congress had power to include. But this is an unusual and extraordinary rule of construction, to say the least, and it does not seem to be well supported by either reason or authority. It makes every case a test case of the constitutional power of Congress, and imports into a mere question of statutory construction the rule of constitutional law that the statute must be upheld unless it appears beyond

a reasonable doubt to be unconstitutional. Even if we were to grant that case upon the question before us the full authority of a decision of the United States supreme court, still it does not control the instant case. For, while track repair is work which facilitates both kinds of commerce, its relation to each kind is direct and proximate. In order to move the interstate traffic, track repair is imperatively necessary and its effect in facilitating that traffic direct and immediate. Here the thing repaired was itself a mere appliance, useful and used, in either kind of commerce, as occasion might require, but not in use for the purpose of facilitating interstate commerce at the time these repairs were made thereon. We also find in *Zikos v. Oregon R. & N. Co., supra,* where the injured employee was engaged in track repairing, the following distinction made or attempted:

"No doubt there may be situations, indeed we have the highest authority for it (*Employers' Liability Cases,* 207 U. S. 463, 495, 28 Sup. Ct. 141, 52 L. Ed. 297), when instrumentalities that may be used for interstate or intrastate traffic, or both, but which at the time are not being used for either, as when engines or cars are undergoing repair, or in cases of clerical work when the acts or things done are not physically or otherwise directly connected with the moving of trains, where there would be no ground for claiming liability under the act of Congress, even though the carrier in fact be engaged in interstate as well as local traffic."

We reach the conclusion that the employee is not employed by the carrier in interstate commerce where he is engaged in constructing or repairing an appliance, which appliance may thereafter be used to facilitate intrastate or interstate transportation as occasion may require, and is intended for such use, but is not at the time the repairs in question are being made in use for the purpose of facilitating interstate transportation. This disposes of all liability of the defendant under the act of Congress in question, and other contentions of the defendant made respecting this subject need not be considered.

2. On the facts stated, was a case made for the appellant under sec. 1816, Stats.? Sub. 8 of that section provides as follows:

"In any action brought in the courts of this state by a resident thereof, or the representative of a deceased resident, to recover damages in accordance with this section, where the employee of any railroad company owning or operating a railroad extending into or through this state and into or through any other state or states shall have received his injuries in any other state where such railroad is owned or operated, and the contract of employment shall have been made in this state, it shall not be competent for such railroad company to plead or prove the decisions or statutes of the state where such person shall have been injured as a defense to the action brought in this state."

No argument is presented by appellant attacking the constitutionality of this section of the statute. Upon principle it seems that the state has power to enact such a statute regulating relations of master and servant where both are within the jurisdiction of this state and the contract of employment is made in this state. The state may in such cases by statute fix the liabilities as between such parties which will arise out of and become incident to such contract of employment, whether the negligent injury occur within this state or outside of this state, where the employee is so outside of the state on the business of the employer and pursuant to the contract made in this state.

But sub. 9 of said sec. 1816 provides as follows: "The provisions of this section shall not apply to employees working in shops or offices." Under the facts stated the plaintiff was a shop employee of the defendant, and such was the nature of his contract of employment. It was held in *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, where this act was sustained upon that ground, that this subdivision referred to a class of employees not engaged in that part of the railroad service which exposes them to unusual dangers and hazards of such service. Literally this subdivision might be read so as to apply only to those while

working in the shop or in the office. But that seems a narrow and irrational construction. A shop employee who goes into the shop yard or even a great distance from the shop for the purpose of performing the kind of labor which is ordinarily done in the shop, is, we think, within this exception. The words "employees working in shops or offices" must therefore, we think, include that class employed for such service whether actually within the walls of the shop or not, so long as they are employed for shop work, although outside the shop at the time of injury. If this is correct no case was made under sec. 1816.

3. We next consider how the case stands at common law. From the case of *Webster Mfg. Co. v. Nisbett,* 205 Ill. 273, 68 N. E. 936, offered in evidence by the defendant to prove the law of that state, we do not understand that the law relative to simple tools is materially different in that state from the law in this state. When the decisions of another state are offered in evidence to prove the law of that state the point decided is what is proven as law, and argument, illustration, wit, humor, or philosophy which may be found in such decision may be considered harmless surplusage. There a blacksmith's hammer was held to be a simple tool with which the employee was or ought to have been familiar. In *Lehman v. C., St. P., M. & O. R. Co.* 140 Wis. 497, 122 N. W. 1059, a pick or hammer used by locomotive firemen for breaking up coal is held to be a simple tool which the master is not bound to inspect for the purpose of discovering defects. In *Meyer v. Ladewig,* 130 Wis. 566, 110 N. W. 419, a machinist's hammer was held to be such simple tool; and in *Stork v. Charles Stolper C. Co.* 127 Wis. 318, 106 N. W. 841, a monkey wrench was assumed generally to belong in this category.

No error is assigned in this court which raises the question of the sufficiency of the instructions. We do not think it appears affirmatively and without contradiction that the punch in question was a simple tool within the rule of the foregoing

cases. The implement was simple enough in form. But it was not simple with reference to its use or its resisting qualities or with reference to the effect of using it after the end became battered or burred. Doubtless there is some good reason for making the punch in the shape described and using a sledge of such weight (ten or twelve pounds), but this is not explained by the evidence. If the plaintiff used, held, or handled the punch immediately prior to the time of injury he might be charged with knowledge of its condition. But the work was done at night. Plaintiff first took part by striking with the sledge and then changed work with a fellow workman and held the light, standing two or three feet from the work. Ostermick, who held the punch, says he found it lying "on the job," picked it up, and it was then, when the work began, somewhat burred. The testimony tends to show that the length of time a tool of this kind may be used before it becomes burred depends upon the quality and temper of the steel. If a punch is properly handled it should be good for five or six and sometimes ten hours before it is re-dressed. But when it is burred to a considerable extent it should be redressed before using. Striking on the punch has a tendency to make the steel hard and brittle and to break off the burrs, which then are apt to fly. When a tool of this kind begins to show signs of burring it should be reforged or reground, and a tool of this kind should not be burred at all when in use. The plaintiff, being a boiler maker, perhaps knew of this generally as applied to tools of this kind, but the jury found upon evidence that he did not know of these defects on the punch in question, which is credible because the work was done at night. The jury also found that he was not guilty of contributory negligence. We cannot say, as against the verdict of the jury, that a punch of this description given, adapted for use in this kind of work and under the circumstances above set forth, was a simple tool.

By the Court.—Judgment affirmed.

SERDAN, Administratrix, Respondent, vs. FALK COMPANY, Appellant.

March 13—April 8, 1913.

Trial: View: Discretion: Master and servant: Death caused by incompetency of fellow-servant: Notice to master of incompetency: Negligence: Proximate cause: Evidence: Damages: Special verdict: Appeal: Harmless errors.

1. Under sec. 2852, Stats., it rests in the sound discretion of the trial court whether or not a view by the jury shall be had; and the granting of a view will not be held error unless palpably wrong and prejudicial.
2. In an action for death of a servant, alleged to have been caused by negligence of the master in retaining in its employ a fellow-servant known to be incompetent, it was not error, after sufficient evidence had been put in to warrant the jury in finding the fact of incompetency, to receive evidence of the reputation of the fellow-servant for incompetency, as bearing upon the question of notice to the defendant, even though it was admitted that defendant's foreman knew of such incompetency.
3. In an action for death caused by negligence it was error to admit evidence as to the age and health of the parents of the widow and the age of the father of the deceased; but as such evidence could affect only the question of damages and it appears that the amount awarded is not excessive, the error was not prejudicial.
4. Where the deceased was forty-one years of age, in good health, and earning about $15 per week, and left surviving a widow twenty-eight years of age, also in good health, a verdict of $4,500 for his death was not excessive.
5. Where the special verdict as submitted covers all the material issues in the case, it was not error to refuse to submit additional questions.
6. Where a master negligently retains in his employ an incompetent servant whose incompetency causes an injury, the master's negligence is, as a matter of law, the proximate cause of the injury.
7. Where a special verdict finds that the incompetency of a fellow-servant was the proximate cause of the injury complained of, and also that defendant's negligence in permitting such servant to do the work which resulted in such injury was the proximate cause thereof, the latter finding controls and entitles the plaintiff to judgment.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to recover damages for the death of Phillip Serdan, alleged to have been caused by the negligence of the defendant in retaining in its employ a servant, Matyilski, known by it to be incompetent, but of whose incompetency the deceased was not aware, and in failing to warn the deceased of such incompetency of Matyilski.

The defendant was a manufacturer of heavy machinery and operated in its plant a foundry for large castings. In it were four electric traveling cranes for use in moving castings and other heavy material. They traveled from east to west and *vice versa,* and were "racked in" and "racked out" to the north and south. Each crane was operated by a craneman, stationed in a cage suspended from the bridge of the crane, and two men, called chainmen, were usually employed to attach and detach weights to be, or which had been, lifted. Each crane was capable of lifting several tons at a time.

On June 16, 1910, the deceased, who had been working in the foundry for about eight months, was engaged in shoveling sand into a milling machine in the foundry. He had nothing to do with the operation of the cranes. An employee named Lewinski was a craneman operating one of the cranes, Matyilski was a chainman employed in connection with the cranes, and Gregson was the foreman of the foundry. Shortly before the accident Lewinski called Matyilski into the cage of the crane operated by him, and then left the foundry. During the absence of Lewinski, Matyilski operated the crane, lifted and moved certain flasks and molds. In doing so he negligently struck the molds against the milling machine, thereby breaking one of the ropes by which the molds were suspended, and one of the flasks fell upon the deceased and so injured him that he died in a short time. He left a widow, *Mary Serdan,* who brings the action as administratrix.

The jury found (1) that at the time Franz Matyilski took

charge of the crane, shortly before the accident, there was no load, consisting of a mold or flasks, hanging suspended from the slings of the crane; (2) that the defendant negligently permitted said Franz Matyilski to operate the crane in question by carrying a load or loads therewith immediately before the accident, which resulted in the death of Phillip Serdan; (3) that any failure on the part of defendant to exercise ordinary care to prevent Franz Matyilski from operating such crane by carrying a load or loads therewith was the proximate cause of the injury to deceased; (4) that the defendant company, in the exercise of ordinary care after discovering the incompetency of Franz Matyilski on Monday, the 13th of June, ought to have prevented his further operating the crane in any manner; (5) that such failure to have prevented his further operating the crane was the proximate cause of the injury to deceased; (6) that the incompetency of Matyilski was the proximate cause of the death of Serdan; (7) that the defendant did not negligently fail to furnish the said deceased, Phillip Serdan, a reasonably safe place in which to perform his work at or near the sand mill; (8) that said chainman, Franz Matyilski, operated said crane so as to hoist from the ground the flasks which struck against the sand mill and caused the accident to deceased, Phillip Serdan; and (9) damages, $4,500.

The defendant moved (1) for judgment in favor of the defendant upon the verdict, or for judgment for defendant notwithstanding the verdict; (2) to reverse the answers to the second, third, fourth, fifth, and sixth questions, and for judgment for the defendant upon the verdict so amended; and (3) to set aside the verdict and grant a new trial upon grounds therein specified. Each of said motions was denied and judgment for plaintiff was entered, from which judgment the defendant appealed.

For the appellant there was a brief by *Doe & Ballhorn*, and oral argument by *J. B. Doe*.

For the respondent there was a brief by *A. J. Hedding* and *Houghton, Neelen & Houghton,* and oral argument by *F. W. Houghton* and *Albert Houghton.*

VINJE, J. The trial court permitted the jury to view the premises. The defendant objected to this on the ground that the situation was entirely changed, because the crane in question was no longer in the foundry but in another building, and the sand mill referred to in the testimony had been moved about a hundred feet. It is also claimed that it was highly prejudicial to defendant to have the jury view work of such an apparently dangerous character as is carried on in a large foundry. Under our practice and the provisions of sec. 2852, Stats., it rests within the sound discretion of the trial court whether or not a view shall be had. The exercise of such discretion cannot be successfully assigned as error unless palpably wrong and prejudicial. *Pick v. Rubicon H. Co.* 27 Wis. 433; *Boardman v. Westchester F. Ins. Co.* 54 Wis. 364, 11 N. W. 417; *Andrews v. Youmans,* 82 Wis. 81, 52 N. W. 23; *Groundwater v. Washington,* 92 Wis. 56, 65 N. W. 871; *Koepke v. Milwaukee,* 112 Wis. 475, 88 N. W. 238; *Rickeman v. Williamsburg City F. Ins. Co.* 120 Wis. 655, 98 N. W. 960. Since the only sharply litigated question as far as defendant's liability was concerned was that of notice to it of Matyilski's disobedience of orders not to run the crane, it is not perceived how the defendant was prejudiced by the view, even though it be conceded it was not necessary. There is practically no dispute in the evidence as to who directly caused the injury and how it happened, so the view could not have influenced the jury in determining the questions really litigated.

Plaintiff's witness Silbar was permitted to answer over defendant's objection the question, "Do you know what the general reputation among the employees of the *Falk Company* of Matyilski was as to his fitness and competency to run

a crane prior to the time that Serdan was killed?" The witness answered, "It was that he ran the crane and did not know how to run the crane." Plaintiff claims this evidence was introduced for the purpose of showing notice to the defendant of Matyilski's incompetency. Before the question was asked of the witness several witnesses had testified as to the incompetency of Matyilski. The defendant claims that since it was admitted that Gregson, the defendant's foreman, knew that Matyilski was not a proper man to operate the crane in lifting and carrying loads, and that he had forbidden him to do so, the evidence would not be construed by the jury as tending to show notice to the defendant of Matyilski's incompetency, but would be understood by them as proving the fact that Matyilski frequently ran the crane before the accident, and that such fact, if true, could not be proved in such way, and as to the fact of incompetency such evidence was improper because the fact was not disputed. In *Moering v. Falk Co.* 141 Wis. 294, 124 N. W. 402, it was held that after sufficient evidence to warrant a jury in finding that a servant has been incompetent has been put in, evidence of the reputation for incompetency or recklessness of the servant is competent upon the question of notice to the defendant. Notwithstanding the defendant's admission that its foreman knew of Matyilski's incompetency, we think it was proper to permit the witness to answer the question, and since testimony had already been introduced that Matyilski had frequently run the crane before the accident, it is not perceived how the defendant was prejudiced by the answer to the question.

Plaintiff was permitted to introduce evidence as to the age and condition of health of the father and mother of Mary Serdan, the widow, and also of the age of the father of the deceased. This was error, because it raised a collateral issue not germane to the case. It is proper to receive competent evidence of the expectancy of life of the deceased and of

the widow as bearing upon the question of financial loss she has sustained by reason of the death of her husband. The error, however, cannot be regarded as prejudicial, and under the provisions of sec. 3072*m*, Stats., must be disregarded. The evidence could affect only the question of damages. The deceased was forty-one years of age, in good health, and earning about $15 per week at the time of his death. He left surviving him his widow, aged twenty-eight, who was also in good health. The jury assessed her damages in the sum of $4,500. This cannot be regarded as excessive.

The defendant requested the court to submit to the jury as a part of the special verdict the following questions:

(1) "Ought the foreman, John Gregson, Jr., in the exercise of ordinary care, to have known in time to have prevented the accident that Franz Matyilski was operating the crane referred to and carrying a load or loads therewith on the day of the accident?"

(2) "Did the defendant negligently fail to warn the deceased, Phillip Serdan, of any danger resulting from the running of said crane by said Franz Matyilski?"

In so far as any issues material to the controversy embraced in the above questions are concerned, they are contained in the special verdict submitted to the jury. The verdict returned by it, for reasons hereinafter to be stated, is deemed to have covered all the material issues in the case. It was therefore not error to refuse to submit the requested questions.

As will be seen from the statement of facts, the jury found that the defendant negligently permitted Matyilski to operate the crane at the time of the accident, and that such negligence was the proximate cause of Serdan's death. They further found that defendant, in the exercise of ordinary care, after having discovered his incompetency, ought to have prevented his further operating the crane in any manner, and that such failure to prevent his operation of the crane was the proximate cause of the injury to the deceased. They also

found that the incompetency of Matyilski was the proximate cause of such injury. Matyilski was a fellow-servant of Serdan, and it is claimed that if his negligence was the proximate cause of the latter's death there is no liability on the part of the defendant. This is true, and the verdict would not support a judgment against the defendant if full force and effect should be given to the jury's answer to the sixth question finding that a fellow-servant's incompetency was the proximate cause of Serdan's death. The sixth question was superfluous under the issues litigated. In a certain sense in every case where a defendant is negligent in keeping an incompetent servant in his employ it may be said that the incompetency of the servant is the direct cause of the accident, though not in law the proximate cause thereof. In seeking for the proximate cause of an injury the proper starting place is the injury itself. *Seaver v. Union,* 113 Wis. 322, 89 N. W. 163. In this case we ask, How was Serdan injured? and we answer, By the incompetency of Matyilski. But we must not stop here. The further inquiry arises, Was there any responsible cause back of the servant's incompetency that allowed it to operate and so produce the injury? and the answer is, Yes, the negligence of the defendant in knowingly permitting the incompetent servant to continue in his employment, thus giving occasion for the exercise of the servant's incompetency. That was the first cause that set in motion the other causes and ultimately produced the injury, though it was not the immediate or direct cause. The jury, therefore, having found that defendant's several acts of negligence constituted the proximate cause of Serdan's death, must have misconstrued the sixth question. For if it be a fact that the evidence sustains the findings of defendant's negligence, then as a matter of law the incompetency of Matyilski was not the proximate cause of the injury, though it may have been the direct cause thereof. That the trial court must have construed the jury's answer to the sixth question as we do is

evidenced by the fact that he gave judgment for plaintiff upon the verdict as returned.

Moreover, where the evidence sustains findings that defendant has negligently retained in its employ an incompetent servant and that the incompetency of the latter has caused an injury, then it can be said as a matter of law that the negligence of the defendant was the proximate cause of the injury.

It is earnestly and forcefully argued by the defendant that the evidence does not sustain the finding that it had knowledge of the fact, or could reasonably anticipate, that Matyilski might violate his orders not to lift loads with the crane. We have carefully examined the evidence upon this point, and though it is not very clear and persuasive, yet we cannot say that it is insufficient to support the verdict.

Several errors are assigned upon instructions to the jury. After a careful examination of them we reach the conclusion that they are not well taken and that they do not require detailed treatment.

By the Court.—Judgment affirmed.

JAKOPAC, Respondent, vs. NEWPORT MINING COMPANY, Appellant.

March 13—April 8, 1913.

Master and servant: Injury: Unsafe working place: Assumption of risk: Assurance of safety: Right to rely thereon: Questions for jury: Evidence: Adverse witness: Cross-examination: Opinions: Arguments of counsel: Improper statements: Damages: Appeal: Harmless errors.

1. The rule requiring the employer to furnish the servant a safe place to work has no proper application to such operations as building, mining, or the like, where the working place is constantly changing and the servant is assisting in making the change himself.

2. In the absence of statutory provision an adult servant assumes the ordinary risks of his employment, and where he enters upon a task attended by dangers which are just as obvious and apparent to him as to the master, this rule applies notwithstanding an assurance by the master or his representative that there is no danger.
3. But if the employee has no actual knowledge of the danger, and it is not obvious to the sense but only to be ascertained by careful examination or test, and the master or his representative having superior knowledge of the situation, [redacted] assuming to have, assures the employee of safety, and the latter, relying on such assurance, goes to work, he will not be held as matter of law to have assumed the risk.
4. Plaintiff, a trammer in defendant's mine, was injured by the falling of ore from the roof of a drift. The shift boss had gone into the drift with his candle, and upon coming out had ordered plaintiff to go in and shovel, telling him the place was as safe as his home. It would have taken some examination of the roof with the aid of a light to ascertain what the condition was. *Held*, that it was a question for the jury whether plaintiff was excused from making such examination for himself.
5. Where plaintiff claimed that he was assured by defendant's shift boss that the place where he was directed to work was safe, and the evidence was such that the jury might find that he had a right to rely upon such assurance, it was proper to permit him to testify to the fact of such reliance.
6. Statements by counsel in the argument to the jury cannot be held to have constituted prejudicial error where there is no agreement and no authoritative statement in the record as to just what was said, and especially where the evidence seems, in a degree at least, to have warranted the alleged statements complained of.
7. Plaintiff, a Croatian unable to speak English, had made through an interpreter a statement to defendant of the circumstances of his injury. Upon the trial the interpreter and another Croatian, who had been present but who spoke a different dialect, were asked by defendant whether in their opinion plaintiff understood everything said by the interpreter when such statement was made. *Held*, that such questions were very near the border line of admissibility, and that the error, if any, in excluding them was not substantially prejudicial.
8. Where, after defendant had introduced and read a deposition, plaintiff was permitted to read to the jury the notice and certificate showing that the deposition was taken in the office of the warden of a penitentiary, thus allowing the jury to infer

that the witness was a convict, the error, if any, is not ground for reversal, in view of an admission by defendant's counsel at the trial that the witness was in fact a convict, since in case of a new trial this fact would probably be proved by record evidence.

9. Where plaintiff, a strong, healthy man thirty-seven years of age, earning $2.30 a day, lost his left leg four inches below the knee, was in the hospital for two months and under treatment for three months after that period, and was unable to walk without the aid of crutches at the time of the trial, three years after the injury, an award of $7,666.66 was not excessive.

APPEAL from a judgment of the circuit court for Milwaukee county: CHESTER A. FOWLER, Judge. *Affirmed.*

Personal injuries. The plaintiff, a Croatian, who could not speak English, was employed by the defendant company as a trammer in the fourteenth level of its mine at Ironwood, Michigan, and was seriously injured by the falling of ore from the roof of a drift, December 21, 1909, he being then about thirty-seven years of age. He was one of a shift of four men, composed of two miners and two trammers. There was a day shift and a night shift, and both were under the direction of a shift boss or foreman named Boalich. The place where the shift was working was in an old drift, the roof of which had settled down, and hence the old timbering was being taken out and new timbering being put in. At the place where the accident happened the old timbering had been removed and some quantity of earth, ore, and rock lay on the floor ready for removal, preparatory to putting in a new set of timbers. The duty of the trammers is to remove the fallen rock and ore and to load the same into small vehicles, called buggies, which run on a track to the chute. It is the duty of the miners to loosen the ore, and also to put in the timbers after the trammers have removed the ore and rock which has fallen. Boalich, the shift boss, testified that it was his duty to direct the men where, when, and how to work; that he had charge of the trammers, and it was part of his duty to see that the place where they work is safe and kept safe; that it

was his duty to tell them to keep out of dangerous places. All employees had candles and were supposed to carry them in their caps. The plaintiff testified that he came to work on the day of the accident at about a quarter to 8 a. m.; that he greased his buggy; that he had a candle, but had put it behind a timber because the draft was so strong; that the shift boss came along and raised his candlestick and went into the place; that he called to plaintiff for a jumper and an auger, neither of which the plaintiff could find; that the shift boss then took a piece of wood or timber and went into the untimbered part of the drift and "was knocking down," and that then he told the plaintiff to come in there and shovel, and he (plaintiff) asked if it was a safe place and Boalich told him it was safer in there than it was in his own home; that he then went in and started shoveling dirt, and when he had shoveled fifteen or twenty shovels a body of iron ore fell on him from the roof and severely injured him.

There is no question of the injury or the seriousness of it raised in the case, but it is claimed on the part of the defense that no assurance of safety was given by Boalich, but that on the contrary he warned the plaintiff that it was dangerous, and it is also claimed that if the plaintiff had used his candle and examined the roof he could have himself seen the danger.

The following special verdict was returned by the jury:

"(1) Was it the custom, in the mine where plaintiff was injured, for the trammers to commence to remove ore or dirt only when directed to do so by the shift boss or miners? *A.* Yes.

"(2) Did the shift boss prior to plaintiff's injury order the plaintiff to commence removing the ore from the place where he was injured? *A.* Yes.

"(3) Did the shift boss before the plaintiff began work at the time of his injury assure the plaintiff that the place was safe? *A.* Yes.

"(4) Was the place at which plaintiff was injured reasonably safe? *A.* No.

"(5) If to the fourth question you answer 'No,' then an-

swer this question: Was the want of safety thus found the proximate cause of plaintiff's injury? *A.* Yes.

"(6) Did the plaintiff know the place was unsafe? *A.* No.

"(7) Ought the plaintiff to have known the place was unsafe? *A.* No.

"(8) Was there any want of ordinary care on plaintiff's part that contributed to produce his injuries? *A.* No.

"(9) What sum will compensate the plaintiff for the injuries sustained? *A.* $7,666.66."

From judgment for the plaintiff on this verdict the plaintiff appeals.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *James G. Flanders,* of counsel, and oral argument by *Mr. Charles E. Monroe* and *Mr. Flanders.*

For the respondent there was a brief by *W. P. Crawford* and *Glicksman, Gold & Corrigan,* and oral argument by *Mr. Crawford* and *Mr. W. L. Gold.*

WINSLOW, C. J. It is very well established that, in the absence of some statutory provision, an adult servant assumes the ordinary risks of his employment, and that the rule requiring the employer to furnish the servant a safe place to work has no proper application to such operations as building or mining and the like, where the working place is constantly changing and the servant is assisting in making the change himself. In the present case, however, the jury have found on sufficient evidence that the plaintiff was assured by the shift boss before he went into that part of the drift where he was hurt that the place was safe. The question presented on the merits is, therefore, whether the evidence was sufficient to justify the jury in finding that the plaintiff could lawfully rely upon that assurance and thus be excused from making any independent examination of the roof of the drift himself before going in to shovel out the rock. We do not have

to go to other states for authorities on this question. This court has held that where an employee enters on a task attended by dangers which are just as obvious and apparent to him as to the master, he assumes the risk, notwithstanding an assurance by the master or his representative that there is no danger. *Showalter v. Fairbanks, M. & Co.* 88 Wis. 376, 60 N. W. 257. This court has also held upon ample authority that "if the employee has no actual knowledge of the danger, and it is not obvious to the sense but only to be ascertained by careful examination or test, and the master or superintendent having superior knowledge of the situation, or assuming to have such knowledge, assures the employee of safety, and the employee, relying on such assurance, goes to work, he will not be held as matter of law to have assumed the risk." *Holloway v. H. W. Johns-Manville Co.* 135 Wis. 629, 116 N. W. 635. If he will not be held to have assumed the risk, for a stronger reason he will not be held as matter of law to have been guilty of contributory negligence. According to the plaintiff's evidence here, the shift boss went into the dangerous place with his candle, and came out and ordered the plaintiff to go in and shovel up the *débris* on the floor, telling him that the place was as safe as his home. It is quite plain that it would take some examination of the roof with the aid of a light to ascertain what the condition was. It was clearly a question for the jury to pass upon, whether, in view of the order and the assurance, the plaintiff was excused from making any independent examination of the roof himself.

A number of detail errors are assigned which will now be considered.

1. The plaintiff examined Boalich, the shift boss, on the trial as an adverse witness, under sec. 4068 of the Statutes, and at the conclusion of the examination the court refused to allow the defendant's counsel to cross-examine him. This was error under the recent case of *Guse v. Power & M. M.*

Co. 151 Wis. 400, 139 N. W. 195. Boalich was, however, called as a witness by the defendant, and fully examined. It is not now suggested that the defendant has been deprived of the benefit of any testimony by reason of the fact that no cross-examination was permitted when Boalich was called by the plaintiff. It seems clear that no prejudice resulted from the erroneous ruling.

2. Against objection, the plaintiff was allowed to state that he believed the shift boss when he told him that the place was safe. This was entirely right. If, as we have held, there was room for the jury to find that the plaintiff could lawfully rely on the assurance of safety, then it was entirely proper for the plaintiff to testify to the fact of such reliance.

3. A controversy between counsel arose during the argument of plaintiff's counsel to the jury with regard to the propriety of certain of the counsel's remarks, the exact purport of which remarks does not certainly appear. The controversy arose in this way: One Sever had acted as interpreter between the plaintiff and the defendant's officers when the plaintiff went to the defendant's offices in July, 1910, and made a statement as to the circumstances under which the accident happened. In this statement, which was introduced in evidence on the trial, no mention was made of the assurance of safety, and it was claimed that it contradicted the plaintiff's evidence on the trial in other particulars. It was claimed by the plaintiff (who was a Croatian) that Sever talked a different language or dialect called Krain, and that he (plaintiff) could only understand a part of what Sever said. Upon the argument to the jury plaintiff's counsel made some statement with regard to the interpreter, the exact purport of which does not appear, but which was evidently a statement intended to discredit his testimony on the ground that he was or might have been in the pay or employ of the defendant. Counsel for the defendant interrupted the argument with an objection at this point and charged that counsel had stated

that the interpreter was the defendant's paid interpreter and under its control, of which fact there was no evidence. A colloquy followed between the court and both counsel, in the course of which counsel for plaintiff denied the correctness of defendant's version of his statement, and started to tell what he did say, when he was interrupted by the court, but finally succeeded in stating that he did not say to the jury that the interpreter was paid by the defendant. At last the trial court stated to the jury, on defendant's request, that there was no presumption that the defendant either hired, employed, or secured the interpreter. Defendant's counsel then asked the court to go further and state to the jury that there was no evidence that the interpreter was secured or paid by the defendant, and this request was refused by the trial judge in the following words:

"I don't think I will so instruct the jury. I will say in respect to the matter that the jury may draw such inference from the testimony in respect to the matter as they think proper and think just in that particular, and the fact that there is testimony that this man came to see this other man and that the man now representing the defendant, Mr. Norris, was present at the time the statement was procured. Now I think that is a fair way to leave the whole matter."

The testimony referred to by the trial judge was the plaintiff's testimony that he never knew the man Sever until he (Sever) came to see him and he did not know who brought him; that he (Sever) came from Hibbing, Minnesota, and talked to him; that he (plaintiff), together with one Scoban, a fellow workman, who was also hurt, went to the defendant's office and that Sever went with them and did the interpreting for both of them, in the presence of one of the defendant's attorneys. In view of the fact that there is no authoritative statement in the record as to just what was said by the plaintiff's counsel, and the further fact that the defendant's version of the statement is challenged as incorrect by the plaint-

iff's counsel, we are unable to see how we can say there was error here, much less prejudicial error. If it was a fact, as claimed by plaintiff, that the interpreter was a total stranger to him and came from Minnesota to see him without request from him, and then accompanied him to the defendant's office and acted as interpreter, not only for the plaintiff but also for Scoban, the other injured employee, in making statements wanted by the defendant company, we are unable to say that there might not be some inferences which could properly be drawn by the jury to the effect that the visit of the interpreter to the plaintiff and his subsequent action was in some way due to some request or inducement coming to him from the defendant.

4. Sever was a witness and was asked what in his judgment would be the chance for any part of plaintiff's statement not to have been understood by him (the plaintiff). The witness Scoban (who was another Croatian, speaking a somewhat different dialect) was also asked whether he thought plaintiff could understand everything Sever said to him at the time the statement was made. Objections by the plaintiff to these questions were sustained by the court, and error is now assigned upon these rulings. The questions may be said to be very near the border line of admissibility. Had they been permitted to be answered, we should have been slow to pronounce the rulings erroneous. Yet it is very apparent that the opinion of either witness as to how perfectly *Jakopac* understood what Sever said to him can only be an opinion based on very uncertain premises and can amount to little more than a guess. Even if the ruling be technically erroneous (a point we do not decide), it cannot be held to be substantially prejudicial.

5. The witness Sever was not present at the trial, but his deposition, which, after due notice, had been taken by the defendant in the office of the warden of the federal prison at Leavenworth, Kansas, was read. Plaintiff's counsel were not present at the taking of the deposition, so there was no cross-

examination of the witness. After the testimony of the witness was read by defendant, plaintiff's counsel offered the notice and certificate in evidence. Objection was made by defendant's counsel to the offer on the ground that they were offered for the sole purpose of showing to the jury the fact that the deposition was taken in the office of the warden of the penitentiary, and thus allowing the jury to draw the inference that the witness was a convict, whereas there were two proper ways to prove that fact, namely, by cross-examination of the witness himself and by introduction of the record of conviction. The court overruled the objection and allowed the notice and certificate to be read to the jury. In making the ruling the court said with regard to the recital showing that the deposition was taken in the prison, "Oh, I think it is proper merely to refer to it as a circumstance in connection with the taking of the deposition, that is all." Later the court said: "It is not evidence, strictly speaking, but I think the facts set forth there are proper to bring to the attention of the jury as showing the circumstances under which the deposition was taken, that is all."

We should have been much better satisfied had the court ruled otherwise. But even if the ruling should be held to be erroneous, the question whether it affirmatively appears that any substantial right of the defendant has been affected by the ruling remains to be considered. Sec. 3072*m*, Stats. While the discussion of the objection was proceeding in the trial court in the absence of the jury, defendant's counsel said, "Of course, the plaintiff in this case is not responsible for the fact that the man *was incarcerated in the prison.* The only place where he could give notice would be notice within the walls of the prison, because *they wouldn't let him out.*" This seems to be an explicit admission that the fact was that Sever was imprisoned for crime. Doubtless if another trial were ordered the plaintiff would produce the record and thus satisfy the technical requirements of the law as to proof of the fact. Under such circumstances, it would seem almost

absurd to say that any substantial right of the defendant had been invaded by the ruling, even conceding it to be abstractly erroneous. To send the case back to allow this fact to be proven by record evidence seems futile. Our conclusion is that it does not appear that any substantial right of the defendant was affected by the ruling.

6. The objection that the damages are excessive must be overruled. The plaintiff, a strong, healthy man of about thirty-seven years of age, earning $2.30 a day, lost his left leg four inches below the knee and was unable to walk without the aid of crutches nearly three years later when the action was tried. The evidence certainly tended strongly to show that he is permanently incapacitated for labor. He was in the hospital for two months and was being treated for three months after that period. He still suffers some pain in bad weather, and doubtless this condition will also be permanent. Under the circumstances we are not able to pronounce the damages excessive.

No other contentions require treatment.

By the Court.—Judgment affirmed.

ADLER, Respondent, vs. GODFREY, Executrix, Appellant.

March 13—April 8, 1913.

Sales: Passing of title: Right to possession: Chattel mortgages: Validity: Inaccuracy in description: Notice: Possession by mortgagor: Lien for storage: Right of mortgagee to take property.

1. A paper signed by the owner of an automobile: "June 2, 1908. Received of John Ure the sum of $2 to apply on Marmon car. Balance due, $1,748; the same to be paid on or before Monday, June 8, 1908. Ure agrees to give one free ride, say Sunday, June 7th," was clearly intended to evidence ownership and right of possession in Ure, and clothed him with at least equi-

table ownership and gave him capacity to make a valid chattel mortgage of the car, good as against any one not having a superior lien to the knowledge, actual or constructive, of the mortgagee.

2. Mere inaccuracies in the description of property covered by a chattel mortgage are not fatal if the subject is so described that it can be readily identified by the exercise of ordinary care, or even by the aid of extrinsic evidence, where there is sufficient in the writing to put one acting reasonably on inquiry.

3. Thus, where the mortgagor had but one automobile, a chattel mortgage thereof stating correctly the manufacturer's name and the serial number of the car was valid, notwithstanding the description was not in other respects wholly accurate, and when such mortgage was filed the mortgagor's vendor (who had not been fully paid and who claimed that the title remained in him as security) was chargeable with notice of its contents and was at least put upon inquiry as to the identity of the car so mortgaged.

4. Such mortgagor having, as provided in the mortgage, been permitted to remain in possession of the car, a garage keeper who stored it for him acquired no lien for such storage as against the mortgagee, even though the latter knew that the mortgagor was keeping the car in a public garage; and the vendor of the mortgagor acquired no such lien by paying the storage claim.

5. Where a chattel mortgage is given, either in the form of a bill of sale or in the ordinary form, without anything being said as to possession pending maturity of the debt, the mortgagee, in the absence of any statutory regulation to the contrary, may exercise his own discretion as to taking possession of the property; and when the mortgagor, being permitted to retain possession for a particular purpose only, abandons such purpose and the property, the mortgagee as holder of the legal title may take the property.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action to recover possession of an automobile.

The cause was tried by the court. The evidence was to this effect: June 2, 1908, Byron R. Godfrey, then owner of the property in controversy, gave to one John Ure, Jr., a signed paper worded thus: "June 2, 1908, Received of John Ure

the sum of $2 to apply on Marmon car. Balance due, $1,748; the same to be paid on or before Monday, June 8, 1908. Ure agrees to give one free ride, say Sunday, June 7th." The car was kept by Godfrey in a public garage. Ure did not change the actual situation for some days later. On the day the paper was delivered Ure made a bill of sale, which was duly filed as a chattel mortgage, intending to convey the automobile to one *Adler* to secure him for indorsing a note which the latter desired to use to obtain money to pay Godfrey. He thereby raised $1,750, and paid $1,500 to Godfrey June 6th thereafter. The bill of sale provided for retention of the car by Ure as a demonstrator. The description of the property in the paper given by Godfrey to Ure was not identical with that in the bill of sale, but the serial number and manufacturer's name in the two papers were the same. On payment of the $1,500 being made to Godfrey he took the car from the garage and used it as he saw fit. When not in use he kept it in the White garage until some time in March, 1909, and Godfrey received word from the White people that there was a storage bill of $65 against it and that it would be sold therefor unless otherwise paid. There was still due Godfrey on the car $250. He claimed the right to take it under a paper he gave Ure when the $1,500 was paid, stipulating that the latter should have possession of the car, but title should remain in the former as security for unpaid purchase money. Godfrey paid the garage people the claim of $65 and took the car without permission of Ure. He used it several months, making some improvements thereon, and then it was taken in this action. In due course, he regained possession with the right to retain it pending termination of the litigation. Later he died and his personal representative was substituted as defendant. The car was worth around $1,700 when purchased by Ure and $1,100 when replevined. It was returned to plaintiff before trial without prejudice.

The court found that plaintiff, at the commencement of the action, was the owner and entitled to possession of the automobile under his bill of sale; that the value thereof when replevined was $1,100 and use $200, and ordered judgment against the personal representative of Godfrey, deceased, and the sureties on his undertaking for the $200, and costs. Judgment was so rendered.

For the appellant the cause was submitted on the brief of *E. J. Henning.*

William Kaumheimer, for the respondent.

MARSHALL, J. Counsel for appellant contends that *Adler's* mortgage did not vest in him any interest because the automobile was not in Ure's possession when the instrument was made. To support that counsel invoke the principle that, in the circumstances assumed, there is no implied warranty of title. The infirmity is in that the premises do not fit this case; so the reasoning and conclusions do not.

This is not a case resting on warranty of title, nor even one of mortgaging after-acquired property. At the best for respondent, Ure had an equitable right to the property as soon as he obtained the memorandum on June 2, 1908. It may be the parties contemplated that, later, some more formal instrument would be made. That it was intended the memorandum, in practical effect and to all appearances, should evidence ownership of the property in Ure, is evident because the paper, on its face, indicates that Godfrey purposes having the garage keeper recognize the former as having the right to take the automobile. Time was given Ure to pay the balance, and it was stipulated that Ure should, in the meantime, afford Godfrey a free ride. That clearly indicates mutual intention that Ure should, from the date of the paper, be considered the actual or constructive possessor of the property. Certainly if the first paper did not clothe him with the full, it did with the equitable, ownership and am-

ple capacity to make a valid chattel mortgage, good as against any one not having a superior lien, to the knowledge, actual or constructive, of the mortgagee.

The further point is made that the mortgage was ineffective as security, because it did not contain a correct description of the machine. Counsel make the mistake, not infrequently observed, of citing foreign cases on a simple matter which has been treated in this court time and again. A single decision in our own jurisdiction, in respect to a particular matter, which has stood as the law of the state for a long time, is better than a large number of foreign adjudications which are more or less in conflict therewith.

Mere inaccuracies in the description of property covered in a chattel mortgage are not fatal, if the subject is so described that it can be readily identified by the exercise of ordinary care, and even by the aid of extrinsic evidence, in case there is sufficient in the writing to put one, acting reasonably, on inquiry. *Newman v. Tymeson,* 13 Wis. 172; *Weber v. Illing,* 66 Wis. 79, 27 N. W. 834; *Harris v. Kennedy,* 48 Wis. 500, 4 N. W. 651; *Knapp, Stout & Co. Co. v. Deitz,* 64 Wis. 31, 24 N. W. 471.

An examination of the cited cases will show how useless it is to refer to authority elsewhere in support of the idea that strict accuracy of description is essential to the validity of a chattel mortgage. The rule of reasonable certainty was early adopted, and also the rule that ambiguity which arises by attempting to apply the description to the thing reasonably supposed to have been intended, may be helped out by extrinsic evidence.

In this case, Ure had but one automobile when he made the paper to *Adler.* The identification number thereof was "Serial No. 17003," and it was a Marmon car. That it was the machine which Ure intended to give, and *Adler* intended to take, security on, there is no manner of doubt. Godfrey was not misled in any way. He must be held to have had

notice of the contents of the paper on file. If that were not sufficient on mere inspection to satisfy him the particular machine was intended, it was certainly enough to put him on such inquiry as would readily have cleared up all doubt about the matter.

A third claim is made that Godfrey became subrogated to the garage keeper's lien for storage and entitled to possession of the property on that account. How Godfrey by stepping into the shoes of Ure and paying off the garage bill could acquire a right superior to the paramount title in *Adler,* is not perceived. The fact that a mortgagor is permitted to remain in possession of the mortgaged property, in the absence of a statute providing otherwise, affords him no implied authority to create a lien thereon for storage superior to the right of the mortgagee. If the garage keeper had no right of lien as against *Adler,* obviously, Godfrey did not obtain any by paying the storage claim. He obtained thereby just what the garage keeper had,—no more and no less. That was a lien as against Ure. Counsel assumes that the lien of the garage keeper took precedence of *Adler's* lien, because the latter had knowledge that Ure was keeping the machine in a public garage. The law is otherwise. Jones, Chat. Mortg. § 472; 7 Cyc. 39, sub. 5.

The further point is made that the chattel mortgage was, in form, a bill of sale, reserving to Mr. Ure the right of possession to enable him to use the machine as a demonstrator, and, therefore, *Adler* had no right to possession when the action was commenced. Little time need be spent with that. The idea that because the bill of sale did not give *Adler,* expressly, the right to preserve his security by taking possession of the machine when necessary therefor, as in this case, is quite novel and is unsound. When Ure abandoned the use for which he was permitted to possess the machine, omitted to pay the garage keeper, and some one had to interfere in order to have the property even housed, his right to posses-

sion was, necessarily, waived in favor of the owner of the paramount claim. Godfrey did not acquire any better right than Ure by interfering to protect his own interests. By common law and common sense, if one person has the title to a chattel and, contingently, to possession thereof, and the latter right is, subject to the contingency, in another, especially when such other is in duty bound to care for the property in the meantime, and he abandons his right, the chattel does not become a thing which a stranger may seize upon, but such right lapses or merges in the paramount right. The mere fact that there was no express stipulation as regards *Adler* taking possession, is unimportant. If a chattel mortgage is given in the form of a bill of sale, or in the ordinary mortgage form, without anything being said about possession pending maturity of the debt, in the absence of a statutory regulation to the contrary, the mortgagee may exercise his own discretion as to taking possession of the property. *Tenney v. State Bank,* 20 Wis. 152; *Appleton I. Co. v. British Am. A. Co.* 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100. Obviously, when the mortgagor is permitted to retain possession for a particular purpose only, and abandons such purpose and, particularly, the property itself, the holder of the legal title may take such property.

There is no other question raised by appellant which seems worthy of mention.

By the Court.—The judgment is affirmed.

DE LONGE, Respondent, vs. FISCHBACK, Appellant.

March 13—April 8, 1913.

Foreign judgment: Alimony: Decree as to amount due: Enforcement in this state.

Where an order or decree of a court of competent jurisdiction in another state, made in a contempt proceeding, adjudging that a certain sum is due from the defendant to the plaintiff for arrears of alimony, has the force and effect, under the laws of that state, of a judgment at law for the payment of money, an action at law for its recovery may be maintained in this state.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Action to recover $10,440 past-due alimony. The complaint alleges that on the 2d day of June, 1891, plaintiff secured a judgment of divorce from the defendant in a court of general and competent jurisdiction of the state of Illinois, to wit, the superior court of Cook county; that the defendant was duly served and appeared personally in the action; and that by said judgment plaintiff was awarded alimony in the sum of $10 per week, as shown by Exhibit A annexed to the complaint, but that no part thereof has been paid. The complaint further alleges:

"That thereafter, and on the 6th day of December, 1911, the said court of Illinois duly ordered and decreed that *Adele de Longe,* formerly *Adele Fischback,* and the plaintiff in the said divorce action hereinbefore referred to and commenced in said superior court of Cook county, Illinois, have leave to file her verified petition and that said *George Fischback* show cause why he should not be adjudged in contempt of court for failing to comply with the decree of said Illinois court entered in said cause of action on the 2d day of June, 1891, as aforesaid, as more fully appears from the verified copy hereto annexed, marked Exhibit B and made a part hereof with the same force and effect as though the same were embodied in full herein.

"Plaintiff further alleges that thereafter, to wit, on the 15th day of December, 1911, the said superior court of Cook county, Illinois, duly entered a decree wherein and whereby it was ordered, adjudged and decreed that there was due to the said plaintiff, *Adele de Longe,* formerly *Adele Fischback,* the sum of $10,440 in accordance with the said decree entered on the 2d day of June, 1891, as aforesaid, and as more fully appears from the certified copy of said decree hereto annexed, marked Exhibit C and made a part hereof with the same force and effect as though the same were embodied herein in full.

"Said plaintiff further alleges that under and by virtue of the provisions of the Revised Statutes of the state of Illinois of 1874, chapter 22, entitled 'Chancery,' and chapter 40, entitled 'Divorce,' such decree so entered as aforesaid and herein referred to as Exhibit C has the force and effect of a judgment at law for the payment of money. That such is the construction thereof and the force and effect to be given to the same as has been adjudicated and determined by the supreme court of said state of Illinois and such is the law of said state of Illinois.

"That by reason thereof, as plaintiff is advised and believes under and by virtue of the constitution of the United States, section 1, article IV, she hath a good right to maintain her cause of action aforesaid in the courts of the state of Wisconsin to have and recover of and from the said defendant the said sums of money so awarded to her as aforesaid, and that said courts will give the same force and effect to said decree as above stated as is given thereto in the state of Illinois."

The defendant demurred to the complaint on the ground, first, that the same does not state facts sufficient to constitute a cause of action; and second, that the action was not commenced within the time limited by law by sub. 1 of sec. 4221, Stats. The court overruled the demurrer, and from an order entered accordingly the defendant appealed.

Rollin B. Mallory, for the appellant.

For the respondent there was a brief by *O'Connor, Schmitz, Wild & Gross,* and oral argument by *A. J. Schmitz.*

VINJE, J. Defendant's counsel announced upon the oral argument that he did not rely upon the second ground of demurrer, so it remains only to consider and determine whether or not the complaint states facts sufficient to constitute a cause of action.

Counsel argues that upon a proper construction of the action of the superior court of Cook county, as shown by its proceedings as a whole, the decree or order of 1911 does not constitute a final judgment for money; that while the decree declares that a certain sum is due from the defendant to the plaintiff for arrears for alimony, yet the whole trend and tenor of the court's action shows that it had the single object in view of determining whether the defendant was in contempt under the original divorce judgment of 1891, and, if he was so in contempt, to give him an opportunity to purge himself therefrom by the payment of whatever sum or sums the court still found due under the judgment, and that it was not the court's intention to render a new and independent money judgment against the defendant. The proceeding in 1911, it is claimed, was simply and purely for contempt under the judgment and decree of 1891, as was shown by the order to show cause and by the fact that at the conclusion of the proceeding an order and not a judgment was entered.

In view of the allegations of the complaint hereinafter referred to as to the force and effect given to the order or decree of 1911 by the courts of Illinois, the argument of defendant's counsel is without force. If the decree of December 15, 1911, is a final judgment which is not subject to change or modification by the court that entered it, then an action thereon may be maintained in the courts of this state. *Kunze v. Kunze,* 94 Wis. 54, 68 N. W. 391; *Dow v. Blake,* 148 Ill. 76, 35 N. E. 761; *Page v. Page,* 189 Mass. 85, 75 N. E. 92; *Wells v. Wells,* 209 Mass. 282, 95 N. E. 845; *Lynde v. Lynde,* 181 U. S. 183, 21 Sup. Ct. 555; *Sistare v. Sistare,* 218 U. S. 1, 30 Sup. Ct. 682. See note to same in 28 L. R.

A. N. S. 1068. That it is such a final decree in fact, seems quite well established by the above authorities, but in view of the allegations of the complaint it is not necessary to decide the question. The allegations of the complaint as to the effect given the decree of 1911 by the courts of Illinois are identical with the allegations of the complaint in *Kunze v. Kunze, supra,* and are, in substance, that such decree under the laws of Illinois has the force and effect of a judgment at law for the payment of money, and it was there held that if such a decree for the payment of alimony has the force and effect under the laws of Illinois of a judgment at law for the payment of money, an action at law for its recovery may be maintained in this state. The demurrer admits the allegations of the complaint as to the effect of the decree in Illinois, and the case is ruled by the decision in *Kunze v. Kunze, supra.*

By the Court.—Order affirmed.

BROWN, Appellant, vs. OCEAN ACCIDENT AND GUARANTEE CORPORATION, Respondent.

March 13—April 8, 1913.

Deceit: False representations: Facts or opinions? Master and servant: Injuries: Right of action: Release induced by insurer's statement as to extent of injuries: Subsequent insolvency of master: Pleading: Sufficiency of complaint.

1. A complaint alleging in substance that plaintiff was injured while in the employ of a concrete company through its negligence and that it was liable to him for such injury; that the defendant had insured said concrete company against claims for such injuries; that immediately after the accident defendant, through physicians and others, took charge of plaintiff, sent him to a hospital, and attempted to cure him; that while plaintiff was under the control of the defendant, its agents and servants, defendant through its agents and servants falsely and

fraudulently represented that plaintiff would be on his feet and ready and able to go to work in five months after the time of the injury, that the injuries were not permanent and would not permanently disable him, and that if plaintiff would sign a release of the concrete company and accept a certain sum defendant would in addition pay all expenses, hospital and doctors' bills until plaintiff was recovered; that relying upon said representations plaintiff signed the release; that said representations were false; that the injuries caused plaintiff to be permanently disabled; and that since signing the release plaintiff has lost his rights against the concrete company by reason of its becoming insolvent,—is *held* on demurrer to state a cause of action.

2. It is a legitimate inference from these allegations that the misrepresentations as to the extent of plaintiff's injuries were made on the authority of the physicians in charge having special knowledge and capable of making accurate statements on that subject, and they must therefore be regarded as representations of existing facts, upon which plaintiff had a right to rely.

3. The gravamen of the cause of action being deceit, it was unnecessary for plaintiff in his complaint either to affirm or disaffirm the settlement which was induced by the fraud of defendant. He might retain the money received and proceed to recover damages for the fraud.

APPEAL from an order of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

This is an appeal from an order sustaining a demurrer to the complaint. The following is the complaint:

"(Title.)

"For a cause of action against the defendant, plaintiff alleges and shows unto the court as follows:

"First. That he now is and was at all the times herein mentioned a resident and inhabitant of the city and county of Milwaukee, state of Wisconsin, and is a married man about thirty-six years of age.

"Second. That the defendant now is and was at all the times herein mentioned a foreign corporation organized and existing under and by virtue of the laws of Great Britain, and engaged in the business at all such times, in the state of Wisconsin, among other things, of insuring employers against

claims made by injured employees, and carrying on what is commonly called employers' liability casualty business.

"Third. That heretofore and on or about the 29th day of September, A. D. 1911, and for a short time thereafter, your plaintiff was in the employ of the Great Northern Concrete Company, a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, and engaged in the business of erecting and constructing buildings, and that as such employee your plaintiff, on the said last named day, was working for the said Great Northern Concrete Company at a building then being erected by it at the northwest corner of Mason street and Broadway in the city of Milwaukee, Wisconsin, and on such day was working on the seventh story of said building, and that while engaged in the duties of his said employment with the said Great Northern Concrete Company, your plaintiff, on said date, by reason of the negligence of said concrete company, was precipitated from the seventh floor of said building to the ground and had his body injured in the manner hereinafter more particularly described. That, as your plaintiff is informed and verily believes, the said concrete company was liable to your plaintiff for the injuries so received because of the negligence of said concrete company, and that at the time your plaintiff received such injuries the said defendant herein had issued to the said concrete company its insurance policy, wherein and whereby, for consideration therein expressed, the said defendant herein had insured and agreed to indemnify and save harmless the said concrete company from the claims of your plaintiff for the injuries so received, and that immediately after the said injuries to your plaintiff the said defendant insurance company took charge of your plaintiff and had your plaintiff sent to the Columbia Hospital, a hospital in Milwaukee county, Wisconsin, for treatment, and employed physicians and others to take charge of your plaintiff and attempted to cure him.

"That a short time after your plaintiff was so injured, and while your plaintiff was in the hospital and under the control of your defendant herein, its agents and servants, the said defendant, through its agents and servants, in or about the month of November, A. D. 1911, at the city and county of Milwaukee, Wisconsin, falsely and fraudulently represented that your plaintiff would be on his feet and ready and able to go to work in five months after the time of such injury,

and that the injuries received by your plaintiff were not permanent and would not permanently disable your plaintiff from doing physical labor, and falsely and fraudulently represented that the said insurance company would, if your plaintiff would sign a release and accept $350, also pay all expenses, doctors' bills and hospital bills necessary for your plaintiff to incur until your plaintiff was fully recovered from said injuries, and that, relying upon said false and fraudulent representations and believing the same to be true, your plaintiff did in the said month of November, 1911, sign some paper, the effect of which is, as your plaintiff is informed and verily believes, to release the said concrete company from any and all liability for the injuries your plaintiff received, as aforesaid, in consideration of $350 then paid by the said defendant insurance company to your plaintiff.

"Plaintiff further alleges that each and every of said representations so made by the said defendant, its agents and servants, were false, fraudulent, and untrue, as the said defendant insurance company at the said time well knew, and that the injuries received by your plaintiff are such that your plaintiff will lose one or more of his legs, and that your plaintiff is permanently disabled from performing physical labor and will be permanently disabled from performing physical labor for the rest of his life, and that the said insurance company did not, as so represented, pay the doctors' bills and expenses hereinbefore referred to. That, as your plaintiff is informed and verily believes, since the time of signing such release the said concrete company has become and is insolvent and your plaintiff has lost his rights against the said concrete company by reason and in consequence of the false and fraudulent representations made by the defendant herein; all to your plaintiff's damage in the sum of fifteen thousand dollars ($15,000).

"Wherefore plaintiff prays judgment against the said defendant insurance company for the sum of fifteen thousand dollars ($15,000), together with the costs and disbursements herein."

The defendant demurred to the complaint for want of facts sufficient to constitute a cause of action.

For the appellant there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *W. L. Gold.*

For the respondent there was a brief by *Aarons & Niven*, and oral argument by *C. L. Aarons*.

KERWIN, J. The court below sustained the demurrer upon the ground that the representations are not actionable, because they relate, first, to what would occur in the future; and second, as to what defendant would do in the future, and that neither of the representations relates to a present or past state of facts; that the representations were nothing more than the expression of opinion as to what the future physical condition of the plaintiff would be. The following cases are relied upon by the court below: *Patterson v. Wright,* 64 Wis. 289, 25 N. W. 10; *Morrison v. Koch,* 32 Wis. 254; *Sheldon v. Davidson,* 85 Wis. 138, 55 N. W. 161; and *Warner v. Benjamin,* 89 Wis. 290, 62 N. W. 179. These cases are quite close to the border line between statements which amount to representations of existing facts and mere matter of opinion; but we do not think they are decisive of the instant case. The complaint in the present case charges that immediately after the injuries the defendant took charge of plaintiff, sent him to a hospital for treatment and employed physicians and others to take charge of him, and attempted to cure him; that while plaintiff was under the control of defendant, its agents and servants, defendant "through its agents and servants" falsely and fraudulently represented that plaintiff would be on his feet and ready and able to go to work in five months after the time of injury, and that the injuries were not permanent and would not permanently disable plaintiff, etc. The complaint is fully set out in the statement of facts, therefore we refer only to the substance of the allegations under consideration. In view of the allegations that defendant took charge of plaintiff, put him in charge of physicians and undertook to cure him, together with the allegation that the representations were made through the defendant, its agents and servants, a legitimate inference from the allega-

tions is that the representations respecting the extent of plaintiff's injuries were made on the statements or by authority of the physicians in charge, and therefore must be regarded as representations of existing facts, coming from persons supposed to have special knowledge on the subject, and capable of stating accurately the extent of plaintiff's injuries. It is therefore apparent that defendant knew or ought to have known through its agents and servants the extent of plaintiff's injuries, and the plaintiff had a right to rely upon such statements as coming from persons with knowledge. We think the complaint states a cause of action under the decisions of this court. *Woteshek v. Neumann,* 151 Wis. 365, 138 N. W. 1000; *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406; *Schiefelbein v. Fidelity & C. Co.* 139 Wis. 612, 120 N. W. 398; *J. H. Clark Co. v. Rice,* 127 Wis. 451, 106 N. W. 231; *Warner v. Benjamin,* 89 Wis. 290, 62 N. W. 179.

The gravamen of the cause of action here is deceit; it is therefore unnecessary for the plaintiff in his complaint either to affirm or disaffirm the settlement which was induced by the fraud of the defendant. The questions discussed by respondent, therefore, under these heads need not be considered. True, plaintiff must allege that he had a cause of action and that by the fraudulent representations of defendant, which he relied upon, he was induced to release it and thereby sustained damage. This the plaintiff has done, and therefore under the authorities heretofore cited the complaint states a cause of action.

The plaintiff was not obliged to rescind the release or agreement obtained by fraud and prosecute the original claim against the Great Northern Concrete Company, but might retain the money received and proceed to recover damages for the fraud. *Gould v. Cayuga Co. Nat. Bank,* 99 N. Y. 333, 2 N. E. 16. It is true that in such action the plaintiff must not only prove the fraudulent representations and his reliance thereon, but also that he sustained damages thereby. Pecun-

iary loss to the deceived party is, of course, essential to the maintenance of the action. *Urtz v. N. Y. C. & H. R. R. Co.* 202 N. Y. 170, 95 N. E. 711. It is claimed on the part of counsel for respondent, however, that the allegations of the complaint as to the cause of action against the concrete company are not sufficient. It is true they are very meager, and whether the complaint is open to a motion to make more definite and certain on that point we need not consider, because we think it is sufficient in the present action where all facts alleged and legitimate inferences therefrom are admitted on demurrer. *Schiefelbein v. Fidelity & C. Co.* 139 Wis. 612, 120 N. W. 398; *Curran v. A. H. Stange Co.* 98 Wis. 598, 74 N. W. 377.

It is further argued that the alleged fraud was not the proximate cause of the plaintiff's injury, but that the insolvency of said Great Northern Concrete Company was the proximate cause of such injury. This does not follow from the allegations of the complaint admitted on demurrer. There is nothing in the complaint which necessarily shows that the insolvency of the Great Northern Concrete Company prevented the recovery of damages by the plaintiff, had no settlement been induced by the fraud of the defendant. It appears from the allegations of the complaint that the insolvency occurred after the signing of the release; how long after does not appear.

We think the court below erred in sustaining the demurrer.

By the Court.—The order appealed from is reversed, and the cause remanded for further proceedings according to law.

BARNES, J., dissents.

STATE EX REL. KASSNER, Plaintiff in error, vs. MOMSEN, Inspector, Defendant in error.

March 13—April 8, 1913.

Milwaukee district court: Appeal in criminal cases: Notice, how "given:" Stay of execution: When term of imprisonment begins: Habeas corpus.

1. Notice of appeal in a criminal case is "given" to the judge of the district court of Milwaukee county within the meaning of sec. 4761, Stats., by filing such notice with the clerk and calling the attention of the court to such filing by motion for a *supersedeas* and presenting a recognizance on appeal for his approval or allowance.
2. A statute giving a convicted person ten days in which to appeal and permitting a *supersedeas* on such appeal if a bond is filed and approved by the judge, gives the judge power to grant a stay of execution upon application of such person to enable him to appeal.
3. The term of imprisonment of a convicted person does not commence before the day on which such a stay of execution expires. A *dictum* in *In re Crow*, 60 Wis. 349, to the effect that the day of sentence is the first day of the term, limited.
4. Where, after the giving of notice of appeal, an attempt is made to give a recognizance and a motion is also made to dismiss the appeal, the judge of the district court may, by virtue of the power inherent in courts of record, delay the execution of sentence until such matters are determined; and the term of imprisonment will not be held to have begun while execution is so delayed.
5. No delay of commitment secured by legal strategy will be considered a substitute for personal presence in jail, and there is no fiction of law by force of which one can be at the same time in jail and at liberty.
6. Error in dismissing the appeal of a convicted person is not available on writ of *habeas corpus*.

ERROR to review a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

William Kaumheimer, attorney, and *Edward T. Fairchild*, of counsel, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, Edward Yockey,* district attorney, and *Henry S. Sloan,* assistant district attorney; a supplemental brief by the *Attorney General* and *W. W. Gilman,* assistant attorney general; and oral argument by *Mr. Sloan* and *Mr. Gilman.* They cited, among other authorities, Wharton, Crim. Pl. & Pr. (9th ed.) § 925*a*; *In re Dolan,* 101 Mass. 219; *Miller v. Evans,* 115 Iowa, 101, 88 N. W. 198, 56 L. R. A. 101, 103; *Dimmick v. Tompkins,* 194 U. S. 540, 24 Sup. Ct. 780; *People v. Patrick,* 118 Cal. 332, 50 Pac. 425; *In re Collins,* 8 Cal. App. 367, 97 Pac. 188; *Fuller v. State* (Miss.) 57 South. 6; *Ex parte Bell,* 56 Miss. 282; *Ex parte Bugg* (Mo. App.) 145 S. W. 831; *Neal v. State,* 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190; *O'Dwyer v. Kelly,* 133 Ga. 824, 67 S. E. 106; *Ex parte Moore,* 12 Cal. App. 161, 107 Pac. 129; *State v. Cockerham,* 24 N. C. 204; *State v. Abbott* (S. C.) 70 S. E. 6; *Ex parte Eldridge,* 3 Okla. Crim. 499, 106 Pac. 980; *Ex parte Riggert* (Okla.) 125 Pac. 485; *Ex parte Branch,* 37 Tex. Crim. 318, 39 S. W. 932; *State ex rel. Buckley v. Drew,* 75 N. H. 402, 74 Atl. 875; *Ex parte Hinson,* 156 N. C. 250, 72 S. E. 310; *Daniel v. Persons,* 137 Ga. 826, 74 S. E. 260; *Ex parte Alexander,* 5 Okla. Crim. 196, 113 Pac. 993; *State v. Horne,* 52 Fla. 125, 42 South. 388; *Tanner v. Wiggins,* 54 Fla. 203, 45 South. 459; *Ragland v. State,* 55 Fla. 157, 46 South. 724; *Morris v. U. S.* 185 Fed. 73; *U. S. v. Pile,* 130 U. S. 280, 29 Sup. Ct. 523.

TIMLIN, J. After a hearing on *habeas corpus* proceeding before the circuit court the plaintiff in error was remanded to the custody of the defendant in error, inspector of the house of correction for Milwaukee county, and the former brings before us said remand for review.

The plaintiff in error was convicted in the district court of Milwaukee county on May 21, 1912, and sentenced to be imprisoned in the house of correction at hard labor for a term

of thirty days, and in addition thereto to pay a fine of $50 and costs of prosecution. On that day he applied for and obtained a stay of proceedings until May 25th following. On the date last mentioned he filed a notice of appeal with the clerk of said district court. On June 6, 1912, after a motion to dismiss his appeal for want of service upon the judge had been filed in the municipal court, the plaintiff in error filed an undertaking to stay proceedings upon the attempted appeal, which undertaking was not approved. On June 13th the appeal was dismissed on said motion and a commitment issued and the plaintiff in error taken thereon to the house of correction, having theretofore paid the fine and costs. On June 20th he demanded his release upon the theory that his term of imprisonment commenced when sentence was pronounced and not when the commitment was issued and executed, and therefore the term had expired. Failing to obtain such release he sued out a writ of *habeas corpus,* and upon return thereto showing the facts aforesaid the circuit court made the remand complained of. A stay was obtained and the proceeding brought to this court on writ of error.

Plaintiff in error relies upon the case of *In re Crow,* 60 Wis. 349, 19 N. W. 713. In that case Crow was sentenced by the circuit court, on four several convictions for misdemeanors, to pay fines and costs, and if not paid forthwith to be imprisoned in the county jail for several successive terms aggregating seventy days. On the same day the clerk issued and delivered to the sheriff four certificates of conviction and sentence, but the sheriff at the request of Crow did not take him into custody thereon or attempt to commit him until March 10, 1884, when he arrested Crow and held him in custody in the county jail by virtue of said certificates. Crow then prosecuted *habeas corpus* proceedings before a court commissioner and was discharged. After the discharge the circuit court made an order directing the clerk to issue other certificates of conviction pursuant to the original sentence and

directing the sheriff to forthwith take Crow into custody and confine him until the fines and costs were paid or until the period limited for his confinement had expired. Crow brought a second *habeas corpus*. It was held that Crow's discharge upon the first writ of *habeas corpus* was conclusive, because for all that appeared Crow had served his full term and had been unlawfully imprisoned after the full term of the sentence had expired, and that the adjudication by the court commissioner on the first writ of *habeas corpus* was conclusive that such was the case. After having disposed of the case on this ground it was also said, although the court expressly disclaimed any right to decide it, that when a prisoner is sentenced to imprisonment the day of the sentence is the first day of the term, and that he is in legal contemplation from that time in a different custody from that of the court. The *dictum* is too broadly stated. In *Cowles v. Neillsville*, 137 Wis. 384, 119 N. W. 91, the distinction between appeals in civil and those in criminal cases from justice court is noticed. Sec. 4761, Stats. (1898), as amended by ch. 159, Laws of 1907, does not require the notice of appeal in a criminal case to be "served" upon any person. It is to be "given" to the justice or judge of the district court. The district court is a court of record, with a seal and a clerk. Notice of appeal is given to the judge thereof by filing such notice with the clerk and calling the attention of the court to this filing by motion for a *supersedeas* and presenting a recognizance on appeal for his approval or allowance. Ch. 72, Laws of 1907, extends the time for appeal from judgments of the district court to ten days, all the other provisions of law relating to appeals from justices of the peace to apply. The statute does not say that the district court shall have only the jurisdiction of a justice's court. Jurisdiction of the district court is conferred by sec. 5 of ch. 218, Laws of 1899, amended by chs. 70 and 124, Laws of 1901, ch. 388, Laws of 1903, and ch. 63, Laws of 1905. The statute gives the convicted person ten days in

which to appeal and permits *supersedeas* on said appeal if a bond is filed and approved by the judge. Sec. 4714, Stats. (1898). It therefore carries with it power to the judge to grant a stay on application of the accused for the purpose of permitting such appeal. This power no doubt must be cautiously and sparingly exercised, but it cannot be that the statute meant to give a convicted person ten days in which to appeal and yet the district court be disabled from granting any stay of proceedings for this period. *In re Webb,* 89 Wis. 354, 62 N. W. 177, cited by plaintiff in error, is rather against him. It is there expressly recognized that the right to suspend sentence can be exercised as incident to a review of the case by a higher court. See, also, *State v. Grottkau,* 73 Wis. 589, 41 N. W. 80, 1063; *State ex rel. Cary v. Langum,* 112 Minn. 121, 127 N. W. 465; *Neal v. State,* 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190. *In re Crow, supra,* must be limited accordingly.

It is unnecessary to here decide whether or not the appeal was legally dismissed. The error in dismissing the appeal, if any error there was, is not available in this proceeding. A writ of *habeas corpus* is not a writ of error. *Kassner* had ten days in which to give his notice of appeal, and had he given a recognizance on the appeal which was approved by the district judge the appeal would have been effectual to continue the temporary stay upon review of the case. Sec. 4714. The court having granted a stay until May 25th for the purpose of enabling the convicted person to appeal, the time of his imprisonment could not in any event commence before the day on which this stay expired nor end in less than thirty days from that time. This writ of *habeas corpus* was issued June 20th of the same year, consequently the relator was properly remanded in any event. By no permissible mode of computation had his sentence expired on June 20th. But under the circumstances of this case, viz. the attempt to recognize and the pendency of the motion to dismiss the appeal,

the court was authorized to delay the execution of relator's sentence until June 13th by virtue of the power inherent in courts of record, and relator's term then begins. We might also add that no delay of commitment secured by legal strategy, however brilliant, intricate, or attenuated, will be considered a substitute for personal presence in the jail, and there is no "fiction of law" by force of which one can be at the same time in jail and at liberty.

By the Court.—Judgment affirmed.

TERRY, Respondent, vs. BARTLETT, Appellant.

March 13—April 8, 1913.

Real-estate brokers: Right to commissions.

1. Where an agent employed by the owner of land to procure a purchaser therefor at a specified price produces a person who is unwilling and whom the agent cannot induce to pay the price demanded, the owner may sell to such person at a lower figure without rendering himself liable to the agent for a commission, provided there is no fraud or bad faith on the part of such owner.
2. The owner of land may place it in the hands of as many agents or brokers as he sees fit, so long as no exclusive agency is given; and if one of them produces a customer the owner is at liberty to deal with him and to pay the agreed commission in case of a sale, without ascertaining whether any other agent or broker has offered the property to such customer, the owner being ignorant of such an offer having been made.
3. Plaintiff, who was to receive a commission if he sold defendant's land or procured a purchaser therefor at $60,000, offered the land to a person at that price but was unable to induce him to give more than $42,000. He reported that fact to defendant but did not disclose the name of his customer. Afterwards defendant, without knowing who plaintiff's customer was, sold the land through another agent to said customer for $43,500. *Held*, that plaintiff was not entitled to any commission.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

For the appellant there was a brief by *Miller, Mack & Fairchild,* and oral argument by *A. W. Fairchild.*

Rollin B. Mallory, for the respondent.

BARNES, J. This action is brought by the plaintiff to recover a commission of $870 alleged to be due on account of a sale of property made for the defendant. The jury returned a verdict in favor of the plaintiff, and from a judgment entered thereon defendant appeals.

There is little dispute in the testimony on material questions. The plaintiff was employed in August, 1905, by the defendant to sell certain real estate, under the following agreement: "He [defendant] asked me to sell the property and agreed to pay me two per cent. commission if I did so, and told me to ask $60,000."

On November 3, 1910, plaintiff offered the property to David Courtenay, a member of the firm of Courtenay & White, real-estate dealers, and also president of the Northwestern Realty Company, for $60,000. Shortly thereafter Courtenay made an offer of $42,000. This offer was communicated to the defendant, but the name of the customer was not disclosed to him. In response to this offer defendant said he would take $50,000. Courtenay refused to buy at this price or to raise his offer. On November 17th defendant advised plaintiff that he might offer the property to his customer at $48,000 and give him one week in which to accept or reject such offer. Plaintiff acted on this suggestion, but Courtenay persisted in his refusal to raise the offer already made. A short time prior to November 24th Ferdinand Bartlett, a son of the defendant, called upon the plaintiff and advised him if he could get his customer up to $45,000 he (Ferdinand) would use his influence with his father to get him to accept this sum. Plaintiff was unable to get Cour-

tenay to raise his offer to $45,000 or in fact to raise it at all, and so advised Ferdinand.

It is undisputed that at no time did the plaintiff disclose to the defendant or to his son who his prospective purchaser was. It is not claimed that plaintiff had any exclusive agency for the sale of the property or that defendant might not place the sale of it in the hands of other agents or sell it himself.

Ferdinand was married, was not living with his father, was employed by one of the Milwaukee trust companies, dickered a little in real estate, had the agency for the sale of his father's real estate, and had himself and in conjunction with one Weller attempted to sell the property in question. Weller also had the agency for the sale of the property for five or six years prior to December, 1910. About the 22d or 23d of November, Weller, knowing that Courtenay or his company had purchased some real estate near the Bartlett property, called upon him in reference to buying this property also. He was advised that negotiations were then being carried on with *Terry* for its purchase, but that they would be at an end by Friday, November 25th. On the following Monday Ferdinand and Weller called on Courtenay and succeeded in securing from him an offer of $43,500, which defendant accepted. On the occasion of this call Ferdinand was first advised that *Terry* had been negotiating with Courtenay. On December 1st defendant signed a contract to sell the property and first learned that Courtenay was *Terry's* customer after this contract was executed. He paid the commission for making the sale to his son.

The foregoing statement embodies the material facts. Where there is any dispute in the evidence, we have given the version of it most favorable to the plaintiff, and we assume that plaintiff's agency did not terminate on November 25th. The principal question before us is: Is the defendant liable to the plaintiff for commission under his contract of employment? The case was submitted to the jury on a general verdict. The court instructed the jury that "the princi-

pal question in the case is this: Was plaintiff the procuring cause of the sale?" The court further instructed the jury as follows:

"When a real-estate agent contracts to procure a purchaser for real estate upon commission, it is not essential that he should bring the purchaser bodily to the owner of the real estate, or disclose to the owner the name of the purchaser before the close of his negotiations with him. What the agent must do is to procure the purchaser through his instrumentality and his efforts, and though the purchaser may not be willing to pay the price which the owner wants for the property, if the purchaser so procured negotiates with the owner, either himself or through another, and the owner voluntarily reduces the price of the property so that a sale is consummated, then the agent or broker is entitled to the commission at the rate specified in the agreement with the owner."

If this is a correct exposition of the law as applied to the facts in this case, then the jury was warranted in returning the verdict which it did. If it is not correct, then it is manifest that no case for recovery was made, because no other theory of liability was suggested and no other theory occurs to us which would sustain a liability.

The respondent relies on the case of *Stewart v. Mather,* 32 Wis. 344, to sustain the claim that the court correctly instructed the jury. There is language used in the decision in that case which tends at least to support the contention of the respondent, if it was intended to lay down a general principle of law applicable to all contracts between a property owner and a broker pertaining to the sale of property regardless of the conditions of the contract of employment. Construing the decision as laying down the law applicable to the facts before the court in that case, the decision does not support the respondent's claim. As is pointed out in the later case of *McArthur v. Slauson,* 53 Wis. 41, 9 N. W. 784, the jury might well have found that the plaintiff did not agree to procure a purchaser at any specific price, but simply one who was willing to pay a price for which the owner would sell.

And it was held in *McArthur v. Slauson* that where an agent is employed to procure a purchaser at a specified price, but one is procured who is not willing to pay the price named, the owner may sell to the purchaser produced at a lower figure, without rendering himself liable for commission, provided there is no fraud or bad faith on his part and the agent is unable to induce his client to pay the price demanded. This decision is placed on the entirely reasonable ground that the agent does not perform his part of the contract by producing such a purchaser and the contingency does not arise which renders the owner liable to pay a commission. The cases of *Ames v. Lamont,* 107 Wis. 531, 83 N. W. 780, and *Bowe v. Gage,* 132 Wis. 441, 112 N. W. 469, are to the same effect. The foregoing rule is subject to the exception, if it is an exception, that where the owner prevents the agent from performing his contract the right to recover is not defeated. *Oliver v. Katz,* 131 Wis. 409, 111 N. W. 509; *O'Keefe v. Stephenson,* 135 Wis. 342, 115 N. W. 805.

The agreement here, we think, was one by which the agent undertook to sell the property at a stated price, in which event he was to receive a commission. The complaint so alleges and the plaintiff's evidence so shows. Manifestly the agent did not fulfil such a contract, because he did not sell the property.

If the agreement be construed as one to procure a purchaser at a specified price, the agent did not fulfil that because he produced no purchaser who was ready and willing to buy at the price named. The purchaser was produced by another agent and at an advanced sum. Defendant might place his property in the hands of as many agents or brokers as he saw fit, so long as no exclusive agency was given. When one of them produced a purchaser he was at liberty to deal with him and to pay the agreed commission in case of a sale, without ascertaining whether any other agent or broker had offered the property to such customer, the owner being ignorant of such an offer having been made.

Even if the contract should be construed as one to bring buyer and seller together at a price satisfactory to the seller, there could be no recovery, because the agent never disclosed the name of his customer to his principal. In fact he advised the principal that the best price he could obtain was $42,000, a sum which was not satisfactory to the defendant, and which was $1,500 less than he sold the property for.

So, viewing the case from any of the three angles from which it might possibly be viewed, we fail to see how the plaintiff has established a cause of action. The court should have directed a verdict for the defendant or else awarded judgment in his favor notwithstanding the verdict.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

ZWIETUSCH, Administratrix, and another, Respondents, vs. BECKER, imp., Appellant.

March 14—April 8, 1913.

Contracts for benefit of third persons: Enforcement: Corporations: Incurring liability before authorized to do business: Acceptance of assignment of lease: Liability of signers of articles.

1. A valid contract made with one person for the benefit of another may be at once enforced by that other, regardless of any formal assent thereto by him prior to the commencement of the action.
2. Acceptance by a corporation of the assignment to it of a lease running to one of its members, and assumption of the obligations imposed by such lease on the tenant, constituted the "incurring of a debt or liability" to the lessors, within the meaning of sec. 1773, Stats.; and where, at the time of such acceptance, one half of the capital stock of the corporation had not been subscribed nor twenty per cent. thereof paid in, signers of its articles of incorporation who knew of and consented to the assignment and its acceptance became personally liable to carry out the obligations of the lease.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling the defendant *Becker's* general demurrer to the complaint. The action was for unpaid rent, and the complaint alleged in substance that on November 15, 1904, the plaintiffs' predecessors in title made a written lease of certain real estate in Milwaukee county to the defendant Richard C. Kann for the term of ten years, at a rental of $4,000 per year; that the lease contained a provision allowing an assignment of the same to any responsible person or corporation upon condition that the assignees, by proper written instrument delivered to the lessors, assumed and agreed to pay the rent reserved in the lease; that in November, 1904, the defendants *Becker,* Kann, and Turner executed and acknowledged articles of incorporation of a corporation called the International Construction Company, with a capital stock of $200,000, which articles were duly filed and recorded as required by law; that in December, 1904, Kann assigned said lease to said corporation by written instrument, which assignment was accepted in writing by the corporation, and the payment of rent assumed by it; that the lessors assented to such assignment, and that the defendants had actual knowledge of said assignment and its acceptance, and of the obligations created thereby, and immediately thereafter went into possession of the premises as incorporators and stockholders of said corporation, and paid the rent therefor to the lessors quarterly from December 6, 1904, to February 14, 1908, by checks in the name of said corporation; that fifty per cent. of the stock of said corporation was never subscribed for and twenty per cent. thereof was never paid in; that at the time of the assignment of said lease and the acceptance thereof by said corporation the defendants were incorporators and subscribers to the capital stock of said corporation, and each of them had personal knowledge of such assignment and acceptance at the time thereof and consented thereto; that

said corporation became bankrupt February 6, 1908, and that said lease was sold by the assignee in bankruptcy to one Luehring, who occupied the premises and paid the rent until August 14, 1908, when he abandoned the premises and has paid no rent since that date; that the lessors, without waiving their rights under the lease, but in order to protect the buildings and reduce the defendants' liabilities for rent, entered on the premises and leased the same to other parties at a rental of $2,000 a year, which was the best rental obtainable therefor, and have received as rental from such tenants $4,000, leaving $9,000 of rent which has accrued on the original lease, which is still unpaid and for which, with interest, judgment is prayed.

Paul D. Durant, for the appellant.

For the respondents there was a brief by *Edgar L. Wood,* attorney, and *Frank M. Hoyt,* of counsel, and oral argument by *Mr. Hoyt.*

WINSLOW, C. J. Sec. 1773, Stats., provides in effect that no stock corporation shall transact business with any other than its members until at least one half of its capital stock is subscribed and at least twenty per cent. thereof paid in; and that if any obligations be incurred in violation of this requirement the signer or signers of the articles transacting such business or authorizing the same, or consenting thereto, with knowledge, shall be personally liable upon the obligations so incurred.

It is alleged by apt averments in the complaint here that neither the required amount of stock had been subscribed nor the required percentage paid in at the time of the assignment of the lease, and that the signers of the articles of incorporation (of whom the appellant was one) knew of and consented to the making of the assignment and the acceptance thereof by the corporation, as well as the assumption by it of the obligations imposed on the tenant by the lease.

If the acceptance of the assignment and the assumption of the obligations of the lease constituted the incurring of an obligation to the lessors, then it is quite clear that the statute was violated and that the signers of the articles became personally liable to carry out such obligation. That a valid contract made with one person for the benefit of another may be at once enforced by that other regardless of any formal assent thereto prior to the commencement of the action, is settled in this state by many decisions. *Tweeddale v. Tweeddale,* 116 Wis. 517, 93 N. W. 440. The law regards such a transaction as at once vesting in the third person a right to have the promise made for his benefit executed, which right cannot be changed by the immediate parties to the transaction. Thus privity is created, to all intents and purposes, between the promisor and the person for whose benefit the promise is made.

Upon the allegations of the complaint the appellant was bound to carry out the obligations of the lease just as fully as the corporation was, and hence the complaint states a good cause of action against him.

By the Court.—Order affirmed.

GREENE, Appellant, vs. AMERICAN MALTING COMPANY, Respondent.

March 14—April 8, 1913.

Change of venue: Prejudice of judge: When application must be made: Milwaukee circuit court: Change of presiding judge: Jurisdiction: Waiver: Parol evidence affecting contracts: Real-estate brokers: Exclusive agency: Sale by owner: Right to commission.

1. The rule that after a trial has been commenced it is too late to apply for a change of venue under sec. 2625, Stats., does not apply where a trial has been initiated and discontinued, making a second initiation necessary, and the application for a change of venue is made before the latter occurs.

2. A mere change of the presiding judge in the circuit court for Milwaukee county is not a change of venue.
3. Even if a change in the presiding judge affected the jurisdiction of said court over the parties and the particular controversy, any objection on that ground was waived by voluntary submission to trial.
4. Mere conversations and negotiations which are presumed to have been embodied in a subsequent written contract are not admissible in evidence when it is sought thereby, not to explain the contract, but to vary it.
5. The owner of land who gives to a broker the exclusive agency to find a purchaser may himself sell the land to a person with whom the broker has no connection and, unless it be specifically so agreed, will not be liable to the broker for any commission on such sale.
6. So *held* where the terms of the agency were shown by a letter from the owner to the broker, saying, "We agree with you that it is better that the sale of the property shall be exclusively in the hands of one broker, and you are the only person who is authorized to handle this property."

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to recover compensation upon a contract of agency to find a purchaser for real estate.

The issue tried was as to whether plaintiff acquired such exclusive authority as to disable the owner from selling his property without being liable to plaintiff for a commission. Plaintiff, as the result of some conversation with defendant's agent, wrote defendant under date of January 8, 1909, soliciting the agency to procure a purchaser for the latter's real estate and suggesting preference for an exclusive agency so as to be in full command of the situation, that it would be a mistake to have several real-estate men working on the proposition, and that he would take the agency on a two per cent. basis. That was replied to and resulted in a second meeting with an agent of defendant in respect to the matter January 17, 1909. Thereafter, under date of January 23, 1909, defendant wrote plaintiff:

"Referring to our conversation in Milwaukee on the 17th inst., I want to say that you are authorized to negotiate for

the sale of the plant owned by us in Milwaukee, known as the plant of the Milwaukee Malt & Grain Co.

"Referring to your letter of the 8th inst., we agree with you that it is better that the sale of the property shall be exclusively in the hands of one broker, and you are the only person who is authorized to handle this property.

"In the event of sale by you we are willing to pay you a commission of two per cent. on the sale price.

"In connection with the above authority, we hereby reserve the right to end this agency at any time upon giving you fifteen (15) days' written notice, on the understanding, however, that the above mentioned commission shall be paid to you not only in the event of sale during the continuance of this agency, but also after its termination, provided the sale is the direct result of your efforts put forth prior to such termination."

That letter was transmitted with another expressing the idea that it was "exactly according to a previous verbal agreement" made between plaintiff and defendant's agent. Plaintiff answered under date of January 29, 1909, accepting the proposition aforesaid.

The court refused to permit the letter of January 8th to be received in evidence, or to permit evidence of what passed between plaintiff and the agent on the 17th day of January, 1909.

After the lapse of nearly a year, plaintiff having failed to find a purchaser for the property, defendant sold the same for $75,000, without aid on the part of plaintiff.

At the close of the evidence the court directed a verdict in defendant's favor.

For the appellant there was a brief by *Carl B. Rix* and *Paul A. Rix,* and oral argument by *Carl B. Rix.* To the point that the plaintiff was given the exclusive agency and the owner was thereby precluded from selling during the agency, they cited *Darrow v. Harlow,* 21 Wis. 302; *Hunter v. Wenatche L. Co.* 50 Wash. 438, 97 Pac. 494; *Metcalfe v. Kent,* 104 Iowa, 487, 73 N. W. 1037; *Novakovich v. Union*

T. Co. 89 Ark. 412, 117 S. W. 246; *Fairchild v. Rogers,* 32 Minn. 269, 20 N. W. 191; *Green v. Cole,* 127 Mo. 587, 30 S. W. 135; *Stringfellow v. Powers,* 4 Tex. Civ. App. 199, 23 S. W. 313; *Blumenthal & Co. v. Bridges,* 91 Ark. 212, 120 S. W. 974, 24 L. R. A. N. S. 279.

Julius E. Roehr, for the respondent, as to plaintiff's right to commission, cited, besides cases cited in the opinion, *Dole v. Sherwood,* 41 Minn. 535, 43 N. W. 569, 5 L. R. A. 720; *Metzen v. Wyatt,* 41 Ill. App. 487; *Stewart v. Murray,* 92 Ind. 543, 47 Am. Rep. 167; *Weaver v. Snively,* 73 Neb. 35, 102 N. W. 77; *Chilton v. Butler,* 1 E. D. Smith (N. Y.) 150; *McClave v. Paine,* 49 N. Y. 561, 10 Am. Rep. 431; *Ettinghoff v. Horowitz,* 115 App. Div. 571, 100 N. Y. Supp. 1002; *Mordecai v. Jacobi,* 12 Rich. Law, 547; *Ingold v. Symonds,* 134 Iowa, 206, 111 N. W. 802; *Turner v. Baker,* 225 Pa. St. 359, 74 Atl. 172; *Gilbert v. Coons,* 37 Ill. App. 448; *Tracy v. Radeke,* 141 Iowa, 167, 119 N. W. 525; *Waterman v. Boltinghouse,* 82 Cal. 659, 23 Pac. 195; *Schultz v. Griffin,* 5 Misc. 499, 26 N. Y. Supp. 713; *Levy v. Rothe,* 17 Misc. 402, 39 N. Y. Supp. 1057; *Moses v. Bierling,* 31 N. Y. 462; *Metcalfe v. Kent,* 104 Iowa, 487, 73 N. W. 1037; *Wright v. Beach,* 82 Mich. 469, 46 N. W. 673; *Lapham v. Flint,* 86 Minn. 376, 90 N. W. 780; *Hoadley v. Savings Bank,* 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321 and note.

MARSHALL, J. Apart from the errors claimed to have been committed on the trial, it is suggested that there was jurisdictional error, in that after the case had been partially tried the proceedings were discontinued with the purpose of commencing the trial anew, and that, as the court was about to do so, an affidavit of prejudice was recognized by assigning the cause for trial in the same court before another judge. That is referred to as a change of venue upon an application not seasonably made. There are three good answers thereto. (1) The commencement of the trial having been rendered

entirely ineffectual, the cause stood the same as before. At any time before entering upon the second trial, it was competent to apply for a change of venue. The rule that after a trial shall have been commenced it is too late to apply for a change of venue under sec. 2625, Stats., *Swineford v. Pomeroy*, 16 Wis. 553; *State ex rel. Winchell v. Circuit Court*, 116 Wis. 253, 93 N. W. 16, does not apply where a trial has been initiated and discontinued, making a second initiation necessary, and an application for a change of venue is made before the latter occurs. (2) There was no change of venue granted. A mere change of presiding judges in the same court is not a change of venue. Either one of the circuit judges for Milwaukee county was competent to preside at the trial. The assignment to a particular judge did not create a disability as to any other. (3) The trial was entered upon and proceeded to judgment without objection. The court, as presided over by the judge in question, had jurisdiction of such subjects. The voluntary submission to the trial gave it jurisdiction of the parties and of the particular controversy. If it did not have the same before, exercise thereof was not such a jurisdictional matter as to be unwaivable.

Complaint is made because the conversation and letter referred to in the letter of January 23, 1909, were excluded. The offer was made for the purpose of explaining the language in respect to the employment to obtain a purchaser being "exclusively in the hands of one broker" and plaintiff being "the only person authorized to handle the property." We are unable to discover any purpose in the inquiries except to produce in evidence the mere conversations and negotiations which must be presumed to have been embodied in the contract made by the letter of January 23, 1909, and the acceptance thereof. There is no term of double meaning in the letter. Moreover, it was approved by plaintiff in face of the accompanying letter stating that it was "exactly" in accordance with the conversation of January 17, 1909. That reinforces the presumption aforesaid. It is evident from that

and the letter of January 8, 1909, which appears in the record, that the evidence was not sought to explain the contract, but to vary it. The circumstances are not of a case of the use of a word or phrase of double meaning and conversations leading up thereto, indicating the particular use the parties had in mind. In the excluded letter "an exclusive agency" was the thing sought upon the ground that it would "be a mistake to have several real-estate men" trying to sell the property at the same time. Conformably thereto, the letter forming the vital part of the contract on defendant's side, used the language "We agree with you that it is better that the sale of the property shall be exclusively in the hands of one broker, and you are the only person who is authorized to handle this property." It really seems that the exclusion of the evidence, especially the letter of January 8, 1909, was rather favorable than unfavorable to appellant. That letter would have made it unmistakable, if not so otherwise, that what appellant was after was an appointment as exclusive agent to find a purchaser for the property, instead of there being "several real-estate men" working therefor at the same time.

So the case comes down to this: If the owner of property appoints another his exclusive agent to negotiate for sale of a particular piece of property, does he thereby disable himself from selling it to a third person, with whom such other has no connection, free from any claim for compensation by such other?

The answer to the stated proposition must be in the negative by, at least, the great weight of authorities. The precise question does not appear to have been heretofore presented here. The Iowa court in *Ingold v. Symonds,* 125 Iowa, 82, 99 N. W. 713, cited to our attention by counsel for respondent, does not state the condition of the authorities much, if any, too strong in these words:

"The right of an owner to sell his own property is an implied condition of every contract of agency, and, unless expressly negatived, will prevail. The commission is payable

only in case of the agent's finding a purchaser and the agent takes his chances on the owner himself making a sale. The only effect of such a contract [an exclusive agency contract] as the one before us is to forbid the owner from placing the property in the hands of any other agent. . . . This view is sustained by the unbroken voice of authority."

The principle above stated may be found applied in many jurisdictions. The adjudications cited by respondent's counsel are good examples and the following are among the best of them: *Baars v. Hyland,* 65 Minn. 150, 67 N. W. 1148; *Mott v. Ferguson,* 92 Minn. 201, 99 N. W. 804; *Armstrong v. Wann,* 29 Minn. 126, 12 N. W. 345; *Putnam v. How,* 39 Minn. 363, 40 N. W. 258; *Golden Gate P. Co. v. Farmers' Union,* 55 Cal. 606; *Hungerford v. Hicks,* 39 Conn. 259; *Kimball v. Hayes,* 199 Mass. 516, 85 N. E. 875.

A distinction is made in some cases between exclusive power to sell and exclusive agency to procure a sale or find a purchaser; in others between an exclusive agency and an agency for a particular time, where, within it, the agent, proceeding in good faith, finds a purchaser; between a sale, as in this case, without any interference on the part of the agent, and a sale to a person to whose attention the property is brought by the agent. Here there was the ordinary exclusive agency to find a purchaser, and after long delay, the owner made a sale without the agent being connected with it in any way. In such circumstances the agent is not entitled to commission.

By the Court.—The judgment is affirmed.

JONES, Appellant, vs. MODERN BROTHERHOOD OF AMERICA, Respondent.

March 14—April 8, 1913.

Life insurance: Benefit societies: Prohibited occupations: Forfeiture: Waiver: Estoppel.

1. A benefit certificate issued by defendant became void when the insured became a paid fireman, but assessments continued to be paid to the secretary of the local lodge. The supreme lodge did not know that the insured had engaged in a prohibited occupation until notice of his death was sent to it by the local lodge, and seasonably thereafter defendant offered to return the assessments received after the certificate became void. By-laws which were a part of the contract provided that the secretary of the local lodge was not the agent of the supreme lodge and that no act or omission on his part should impose any liability upon or waive any right or immunity of the society. *Held*, that there was no waiver or estoppel preventing defendant from setting up a forfeiture.
2. The furnishing by defendant of blank proofs of loss in such a case and the making of such proofs by the beneficiary did not operate as a waiver of the forfeiture, it being expressly provided in the contract that they should not have that effect.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

This is an appeal from a judgment of nonsuit. The action is upon a benefit certificate for $500 issued by the defendant, a foreign fraternal beneficiary organization, May 30, 1908, on the life of one Richard Burke in favor of the plaintiff, who was his foster mother. The assessments were sixty-five cents per month, and were payable to the secretary of the local lodge at Milwaukee. Burke became a paid fireman in the service of the city of Milwaukee, November 1, 1909. This was a prohibited occupation under the terms of the certificate, and his entering into that occupation *ipso facto* made the certificate void. The plaintiff paid the dues to the secretary of the local lodge monthly as they fell due. When

she paid the monthly dues accruing next after Burke became a fireman, she asked the secretary of the local lodge whether Burke was still a member, he having joined the fire department, and the secretary told her he would write to the supreme lodge and let her know. When the plaintiff came to pay the dues on the following month, the secretary told her he had not heard from the supreme lodge, but it was all right because he had not heard from them. Plaintiff also asked Mrs. Allen (the outgoing president of the local lodge) in January, 1910, if her son could still be a member, and Mrs. Allen promised to find out and let her know, but never did so. Burke was killed in performing his duty at a fire in Milwaukee, March 24, 1911. His assessments were fully paid at the time. The local lodge gave notice to the supreme lodge, and blank proofs were sent by the secretary of the supreme lodge to the plaintiff, which were executed at an expense of one dollar and forwarded to the supreme lodge. Payment was refused, and this action brought. It appeared also that some person acting on behalf of the defendant offered to return to the plaintiff the amount of the premiums paid while the deceased was a member of the fire department, but that she refused to receive the money.

The certificate provided that the articles of incorporation and the by-laws of the defendant society should form a part of the contract of insurance. Among these by-laws were the following:

"Section 135. *No waiver of any by-laws.* No officer of this society, either of the supreme or any subordinate lodge, shall have any power or authority, nor shall such officer be permitted to waive any of the provisions of the by-laws of this society which relate to the contract between the members and the society, whether the same be now in force or hereafter enacted."

"Section 177. *Secretary—Agent of subordinate lodge.* The secretary of the subordinate lodge is hereby made and declared to be the agent of such lodge, and not the agent of the supreme lodge, and no act or omission on his part shall

impose any liability whatever on this society, nor shall such act or omission have the effect of waiving any right or immunity belonging to this society."

"Section 150. All death and accident proofs before being acted upon shall be executed in the form prescribed by said board, and furnished by the supreme secretary; but the furnishing of such blanks or the execution thereof shall in no case be construed as a waiver on the part of the society of a forfeiture for any cause by the member or his beneficiary or beneficiaries of all benefits; nor shall it be construed as a waiver of the right to demand further proof. And in each and every case it shall be the duty of the claimant to furnish and file with the supreme secretary the proof of death or accidental injury as above and herein provided."

For the appellant there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Walmsley.*

For the respondent there was a brief by *Bohmrich & Gabel,* and oral argument by *Louis Bohmrich.*

WINSLOW, C. J. It is admitted by the appellant that the certificate was rendered void when the deceased became a paid fireman, but it is claimed that the defendant has prevented itself from setting up this defense by acts constituting waiver or estoppel. These acts are (1) the acceptance and retention of the monthly assessments paid by the plaintiff from November, 1909, until the death of Burke, with knowledge of the fact that he was a paid fireman, and (2) the sending by the defendant to the plaintiff, after knowledge of the facts avoiding the certificate, of blank proofs of loss, and the making out of such proofs at an expense of one dollar.

The difficulty with the first proposition is that there is no proof that the supreme lodge or its officers ever had knowledge of the fact that the deceased had engaged in a prohibited occupation. The plaintiff testifies that she told Finn, the secretary of the local lodge, of the fact, and that he promised to write to the supreme lodge and find out what the effect would be, and that a month later Finn told her that he had written

and received no reply, and that it must be all right. Finn was not called as a witness. The statement of the plaintiff that Finn told her he had written to the supreme lodge was the merest hearsay and proves nothing. The notice to Finn himself was not notice to the supreme lodge, because the parties contracted by sec. 177 of the by-laws that the secretary of the subordinate lodge is not to be considered the agent of the supreme lodge. No reason is perceived why the parties could not make a binding contract of this kind. So far as the evidence shows, the first knowledge that the supreme lodge had that Burke had engaged in a prohibited occupation was when the notice of death was sent to it by the local lodge. It appearing that the defendant seasonably after acquiring such knowledge offered to return the assessments received, neither waiver nor estoppel can be successfully urged.

As to the second proposition, it appears by sec. 150 of the by-laws that the parties contracted that the furnishing of blank proofs of loss should not be considered as a waiver of a forfeiture, and that it should be the duty of the claimant to furnish the proofs in any event.

By the Court.—Judgment affirmed.

BECKER, Respondent, vs. BECKER, Appellant.

March 15—April 8, 1913.

Divorce: Alimony: Marriage: What constitutes: Validity.

1. If there has been no marriage there can be no alimony.
2. An oral contract of marriage made between competent parties *per verba de præsenti*, although without witness or ceremony of any kind, if consummated by cohabitation and corroborated by holding themselves out to the public as husband and wife, is a valid and binding marriage.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Walmsley.*

For the respondent the cause was submitted on the brief of *Julius E. Roehr.*

TIMLIN, J. The respondent had a judgment for divorce and alimony against the appellant in the circuit court, and upon this appeal appellant raises the point that there was no marriage. The circuit court upon sufficient evidence found:

"That on or about August 15, 1898, at Milwaukee, Wisconsin, the plaintiff and the defendant agreed to take one another as husband and wife, and lawfully became husband and wife, and subsequently and from the time of the making of such contract and up to about the 10th day of May, 1911, the plaintiff and the defendant lived and cohabited together and were known in the community in which they lived, in the city of Milwaukee, in the state of Wisconsin, as husband and wife, and during said time the defendant at all times represented and held out that the plaintiff was his wife, and the plaintiff represented and held out that the defendant was her husband."

This, we take it, fairly means that an oral contract of marriage, *per verba de præsenti,* was made between the parties and consummated by cohabitation and corroborated by holding themselves out to the public as husband and wife. No question of the competency of the parties is made. The appeal fairly raises the question of the validity of such marriage, because if there was no marriage there could not be alimony. 2 Bishop, Mar., Div. & Sep. § 855, and cases cited. This is in harmony with our statute law, wherein sec. 2361 provides for support of the wife or minor children and suit money during the pendency of an action for annulment of marriage, while alimony is authorized only in actions for di-

vorce. Sec. 2364. The causes for which an action to annul the marriage may be brought are specified in sec. 2351, and cover void as well as voidable marriages, but no annulment suit is authorized by statute upon the ground of failure to obtain a marriage license or to solemnize or celebrate the marriage before a civil officer or a clergyman as required by secs. 2331 to 2339*g*. The question whether there may be in this state a marriage legally valid and binding, when resting only upon an oral agreement, entered into by competent parties without witness or ceremony of any kind, to then take each other for husband and wife, consummated by cohabitation and by holding themselves out to the public as married, has never heretofore been directly presented to this court for decision.

In *Martin v. Ryan,* 2 Pin. 24, one sued for an ante-nuptial debt of his alleged wife attempted to escape liability on the ground that the person who officiated at the alleged marriage as a minister of the gospel had not filed his credentials of ordination as required by statute. Among other reasons for holding this plea insufficient the court said, *arguendo,* that after the ceremony the parties thereunto lived together as man and wife and Martin had recognized the woman as his wife before the world. There was in this case a ceremony.

Williams v. Williams, 46 Wis. 464, 1 N. W. 98, was an action brought to recover dower, the plaintiff resting her right upon the claim that she was the widow of one Williams. There was a formal or ceremonial marriage contract between the plaintiff and said Williams on May 9, 1870, but this was alleged to be void because plaintiff was at the time the lawful wife of one Jones, from whom she had been divorced by a judgment of the circuit court for Kenosha county in November, 1870. The plaintiff contended that this decree of divorce did not conclusively establish that she had ever been lawfully married to Jones, and that in fact she had not because Jones had a lawful wife living at the time plaintiff was

married to him and who was still living. These were apparently all formal or ceremonial marriages, but in answer to a contention of the plaintiff's counsel that a valid marriage should be presumed to have taken place between the plaintiff and Williams after she secured the divorce from Jones, and in declining to so hold because the relations between the plaintiff and Jones were hypothetically unlawful and meretricious, the court said:

"The law of this state declares that marriage is a civil contract (sec. 2328, R. S. 1878); and there is no statute law which points out in what manner the contract must be entered into to render it valid. It need not be in writing or in the presence of witnesses, but there must be an agreement between the parties that they will hold toward each other the relation of husband and wife, with all the responsibilities and duties which the law attaches to such relation, otherwise there can be no lawful marriage."

This case came up again in 63 Wis. 58, 23 N. W. 110, where it was ruled that the divorce judgment did not estop the plaintiff from showing she was never legally married to Jones because at the time of her supposed marriage to him he had a wife living, hence that she was entitled to dower as the lawful wife of Williams.

In *Spencer v. Pollock,* 83 Wis. 215, 53 N. W. 490, there was a proceeding to determine the descent of lands and a claim that the deceased owner left surviving him a widow. The finding of the circuit court was to the effect that the relations between deceased and this claimant were meretricious in their inception, and this decision was affirmed. True, it is rather assumed that no ceremonial marriage was requisite, this court saying after referring to the testimony: "From this testimony it is claimed that a common-law marriage is proven." A decision that there was no valid marriage at common law or otherwise does not expressly cover the question here presented.

In *Thompson v. Nims,* 83 Wis. 261, 53 N. W. 502, there

was an appeal from a judgment of the circuit court adjudging Julia L. Nims, since deceased, to be the widow and only heir at law of one Thompson, deceased intestate. It was shown that the claimant and Thompson left the house of her father and mother, apparently with the full knowledge and consent of the latter, with household goods, declaring that they were to be married. They stopped that day at a hotel, and after arriving there Thompson went out and returned with a person whom the claimant believed was a minister. The court did not allow claimant to testify as to what further took place with reference to the marriage contract and no other witness was produced. She further testified that this person remained in the room about half an hour, that after that time she had always borne the name of Mrs. Thompson, and that she and Thompson lived together and held themselves forth as husband and wife. This testimony tended to prove that some ceremony of marriage took place before a person thought to be a clergyman. It was sufficient to support the judgment below. This court in the opinion repeated what was said in *Williams v. Williams,* 46 Wis. 464, 1 N. W. 98, and went further:

"This agreement is a fact to be proven. It may be proven by circumstantial evidence as many other facts are proven. In this case there is no direct evidence that these parties promised to assume the relations of husband and wife, but the circumstances proven seem to us very persuasive and to justify the finding that there was a marriage in fact."

In *Lanham v. Lanham,* 136 Wis. 360, 117 N. W. 787, there was an application by the woman for her support out of the estate of one Lanham, deceased, based on the claim that she was the widow of said deceased. She was married to the deceased by ceremony before a justice of the peace at Menominee, Michigan, and returned with Lanham to Wisconsin to reside. The parties immediately assumed the relations of husband and wife and lived and cohabited together until Lan-

ham's death. This marriage was within one year from the date of her divorce from one Sherman and forbidden by statute, and it was held invalid. The marriage was further attempted to be upheld on the ground that there was a common-law marriage resulting from the fact that the parties lived and cohabited together as husband and wife for about six months after the expiration of the year and after her disability to contract marriage had ended. This court, assuming apparently that there could be such a thing as a valid "common-law marriage," held the evidence insufficient to establish that form of marriage.

In *Severa v. Beranak,* 138 Wis. 144, 119 N. W. 814, the question came up with reference to a marriage contracted within a year after divorce and therefore invalid. The court below held there was a common-law marriage between the parties. This decision was reversed, this court saying: "The conclusion that there was a common-law marriage between the parties under the facts aforesaid cannot be upheld."

These decisions clearly indicate that the judges of this court understood that a valid marriage contract could be made by mere private oral agreement between parties competent, if consummated by cohabitation as husband and wife and corroborated by holding themselves forth to the public as married. The same status grew out of a contract so made, performed, and corroborated as resulted from a formal or public solemnization of the contract before an officer or a clergyman; and the statutes on the subject have not since been changed in any respect material to this question. It may not be out of place, however, for me to notice the law on this subject elsewhere.

In Kent's Commentaries, which has stood for a long time as a reliable text-book on American law, it is said:

"If the contract be made *per verba de præsenti,* and remains without cohabitation, or if made *per verba de futuro,* and be followed by consummation, it amounts to a valid mar-

riage in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiæ.*" 2 Kent, Comm. (14th ed.) p. 87.

That part of this sentence relating to contracts for the future has been disapproved in *Cheney v. Arnold,* 15 N. Y. 345, and in other cases. The law as determined by the instant case is affirmatively stated as applied to the facts before the court and much narrower than the foregoing quotation. It is unnecessary to negative questions not argued and not before the court on this appeal. Whether such a marriage would be upheld where there was no consummation by cohabitation or corroboration by holding themselves out as married, we are not called upon to decide. Blackstone states the law on this subject more cautiously as follows:

"Any contract made, *per verba de præsenti,* or in words of the present tense, and in case of cohabitation *per verba de futuro* also, between persons able to contract, was before the late act deemed a valid marriage to many purposes; and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiæ.* But these verbal contracts are now of no force to compel a future marriage. Neither is any marriage at present valid that is not celebrated in some parish-church or public chapel, unless by dispensation from the archbishop of Canterbury." 1 Bl. Comm. ch. 15, p. 439.

For an instance where the parties to an informal or irregular marriage contract were cited before the ecclesiastical court and required to have a regular marriage ceremony performed, see *Baxtar v. Buckley,* 1 Lee, Eccl. Cas. 42. It would be impractical to review the great number of cases in the courts of this country upon this point. They are well summed up and the cases collected in 26 Cyc. 837, 838, note 59, Id. 840, and note 74, and reach back to a very early period in our history.

"In pursuance of the rules just stated, and of the statutes in many states declaring marriage to be a civil contract, it is held that a valid common-law marriage may be constituted by

a mutual agreement between two parties who are both capable of entering into marriage, and as to whom no impediments exist, whereby they presently undertake and contract to become husband and wife and mutually promise to continue that relation permanently, and thereupon assume their marital duties and cohabit together."

"Statutes requiring marriages to be solemnized in a particular manner or before certain authorized persons or under a license, although they may impose penalties for nonobservance, are generally construed as directory only, in so far as this, that a marriage valid at common law, but not celebrated in accordance with the requirements of the statute, will be held valid and binding, unless expressly declared void by the statute." Ibid. 840.

After these American courts had become committed to this view of the "common law," the highest court of England in the year 1844, in *Queen v. Millis,* 10 Cl. & F. 534, by an equal division, affirming an equal division below, decided against the existence of any such rule in the common law of that country. This was followed in *Beamish v. Beamish,* 9 H. L. Cas. 274, and it is now established as the rule of the common law in the place of the origin of that law. These cases are severely criticised by Mr. Bishop (1 Bishop, Mar., Div. & Sep. §§ 400 to 422), where the position of the courts of Massachusetts, Maryland, and Maine on this question is also referred to.

In *Milford v. Worcester,* 7 Mass. 48 (1810), a marriage by oral agreement of the parties, although consummated, was held void and insufficient to confer upon the woman a legal settlement in the town in which the alleged husband was domiciled. Considering, apparently, the expediency of recognizing such marriages, the court advised young women of honor to shun the man "who prates about marriage condemned by human laws, as good in the sight of Heaven. This cant, she may be assured, is a pretext for seduction." This is worthy of consideration, but is not entitled to great weight in interpreting a statute which declares marriage a civil contract.

Besides, the cases come before the courts after the harm is done, and it cannot be very inequitable to hold the seducer to his contract.

The lessons of the past are not to be lightly disregarded, and almost every people have some mode of recognizing these informal marriages. The laws of the Jewish people upon this subject received great consideration, experts were examined and the works of the learned Maimonides and the Beth Joseph consulted, in *Lindo v. Belisario,* 1 Hagg. Con. Rep. 216, Id. Appendix, 7, and it was thought that under both the Jewish and the canon law such marriages were recognized. By the canon law as it existed before the Council of Trent in 1563 (Hist. Council of Trent, Brent's Trans. (1675) 707), and after that in those countries which denied the authority of that council, this private contract of marriage was recognized and upheld. Phillimore, in ch. 7 of vol. 1 (2d ed.) of his learned treatise on Ecclesiastical Law, says that although this law desired marriages to be solemnized openly it did not consider such public solemnization essential to the validity of the bond, and cites the learned and much quoted opinion in *Dalrymple v. Dalrymple,* 2 Hagg. Con. 54, 4 Eng. Eccl. 48, to the same effect.

Sometimes the equities are worked out by permitting a suit for annulling such marriage in which the marriage obtains a partial recognition or a formal marriage may be decreed; as by the Code Napoleon, which by sec. 165 requires that marriage be celebrated before a civil officer, but further specifies who may impeach an informal or irregular marriage, and by sec. 201 provides that a marriage which has been declared null draws after it, nevertheless, civil consequences as well with regard to the married parties as to their children, when the marriage has been contracted in good faith. By the German Civil Code a marriage is declared void if not entered into with the prescribed ceremonial (sec. 1317). But the invalidity of marriage upon this ground is established by means of an action for nullity (nichtigkeitsklage), and the voidable marriage is valid to all intents and

purposes until avoided by such a suit. Id. secs. 1324, 1329. Indeed, the notion of an inferior sort of contract made without ceremony, good when fully executed but otherwise without enforceable obligation, runs through all law. It is reflected in the ancient Roman "Pactum," "Sponsio," and "Jusjurandum," as well as in our law, which at different stages of its growth required for the validity of certain contracts the ceremonial of a seal, livery of seisin, signature or writing, earnest money, etc. This is also observable in the codes mentioned and in Walton's Civil Law in Spain and Spanish America, arts. 1216, 1223, and 1225. So that where the statute law declares marriage a civil contract, although the duties and obligations arising from such contract and the status thereby created are fixed by law, there are many precedents, reasons, and analogies for the rule that, in the absence of statute expressly declaring such marriage invalid, an informal contract of marriage, *i. e.* one made between competent parties without the legal ceremonies and in the absence of the clergyman or civil officer, is, when consummated by cohabitation, valid and binding upon the parties. If follows that the judgment of the circuit court should be affirmed.

By the Court.—Judgment affirmed.

BAERMANN, Respondent, vs. CHICAGO & MILWAUKEE ELECTRIC RAILWAY COMPANY, Appellant.

March 15—April 8, 1913.

Street railways: Injury to passenger while alighting: Operating of car by defendant: Negligence: Evidence: Adverse witness: Right to cross-examine: Appeal: Harmless errors: Special verdict: Unnecessary questions: Damages: Future suffering: Excessive award.

1. In an action for personal injuries alleged to have been sustained while alighting from an electric car, admissions and evidence tending to show that defendant owned the road on which the car was being operated and that its name was on the car, to-

gether with the motorman's testimony that he was working for defendant, were sufficient, *prima facie*, to show that defendant was operating the car.

2. After the motorman, upon being examined as an adverse witness under sec. 4068, Stats., had testified that he was working for defendant, it was error to refuse to permit defendant to cross-examine him on that subject; but the error was not prejudicial, it appearing that the motorman was afterwards called as a witness by defendant, but no questions asked of him as to that matter and no proof offered that defendant was not operating the car in question.

3. In an action for personal injuries, the refusal to submit in the special verdict the question, "Is plaintiff's present physical condition of which she complains due to the accident?" was not error, where the jury were instructed that plaintiff could recover only such damages as it was reasonably certain she had suffered "as a natural and probable consequence of the injury which she sustained."

4. Where the evidence tended to show that at the time of the trial plaintiff was still suffering from the injury, it was proper to instruct the jury as to damages recoverable for future suffering.

5. An award of $1,200 in this case, reduced by the trial court from the jury's award of $2,000, is *held* not excessive.

6. Plaintiff's testimony that the car on which she had been riding had stopped and that it suddenly started up while she was in the act of getting off, corroborated to some extent by the testimony of her son, about eight years old, who was with her, was sufficient to raise a jury question as to defendant's negligence, although three passengers and the motorman and conductor testified that plaintiff attempted to alight from the car while it was in motion.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

Plaintiff brings this action to recover damages for personal injury alleged to have been sustained while alighting from one of defendant's cars in the city of Milwaukee. The negligence claimed was that while she was in process of alighting the car suddenly started forward in such a manner as to cause her to be thrown to the pavement. The jury found negligence on the part of the defendant which was the proximate cause of the injury and no want of ordinary care

on the part of the plaintiff. The defendant appeals from a judgment entered on the verdict.

The cause was submitted for the appellant on the brief of *Edgar L. Wood,* attorney, and *Bull & Johnson,* of counsel, and for the respondent on that of *Harry M. Silber.*

BARNES, J. 1. The appellant insists that there was no evidence to show that the defendant was operating the car in which plaintiff was riding immediately before she was injured. The proof was slight, but sufficient to make a *prima facie* case. The admissions of the answer, taken in connection with the evidence on the trial, would, we think, warrant the jury in finding that the defendant owned the road on which the car was being operated. The evidence also showed or at least tended to show that the defendant's name was on the car in which the plaintiff was riding at the time she claims to have been hurt. The motorman on the car also testified that he was working for the defendant. No evidence was offered on the point by the defendant. The plaintiff offered sufficient evidence to make a *prima facie* case.

2. The appellant insists that it was denied the right to cross-examine the motorman who was called to testify as an adverse witness under the provisions of sec. 4068, Stats. No questions were asked, but defendant's counsel stated that perhaps he ought to ask some questions to determine whether or not the motorman knew for whom he was working. An objection was made to any cross-examination and the court sustained it. This ruling is assigned as error. Assuming that the appellant properly raised the question, the ruling of the court was erroneous. In view of the matter covered by the direct examination, defendant had a perfect right to pursue the proposed cross-examination. *Guse v. Power & M. M. Co.* 151 Wis. 400, 139 N. W. 195. We do not think the error should be held to be prejudicial. The motorman was called as a witness by the defendant on the trial, but no questions

were asked of him in reference to this matter. It was a very easy matter for the defendant to show beyond controversy that it did not operate the car in which plaintiff was riding, if such was the fact. The failure of the defendant to offer such proof is strongly suggestive of the conclusion that it was not forthcoming and that the objection is somewhat technical. Evidently reliance was not placed on the nonexistence of the fact claimed to exist, but on the apparent weakness of the plaintiff's evidence to prove it.

3. It is claimed that the court erred in refusing to submit the following question to the jury: "Is plaintiff's present physical condition of which she complains due to the accident?" The submission of this question was unnecessary. The court charged the jury that the plaintiff was entitled to recover only such damages as it was reasonably certain the plaintiff had suffered "as a natural and probable consequence of the injury which she sustained." This instruction very properly advised the jury that damages should not be assessed for physical infirmities which were not due to the injury.

4. The court instructed the jury that plaintiff was entitled to recover damages for the pain and suffering which she had undergone as a natural and probable consequence of the injury, and also for the pain and suffering "which you are satisfied from a preponderance of the evidence to a reasonable certainty she will sustain in the future by reason of such injury." Exception is taken to the part of the instruction quoted, because, it is argued, there was no evidence in the case which would warrant the jury in assessing damages for future pain or suffering. According to the medical testimony as we understand it, the plaintiff's condition at the time of the trial might be due to child-birth, to injuries received from a fall, or to other causes. There was some evidence given by the plaintiff herself which we think would warrant the jury in finding that she was still suffering from the fall. This being the case, the instruction was proper.

5. Appellant further insists that the damages assessed are excessive. The jury awarded $2,000. The trial judge gave the plaintiff an option to remit $800 or take a new trial. She elected to take judgment for $1,200. The trial court heard and saw the plaintiff and the medical experts and was in a better position to pass on the question of damages than is this court. It made a substantial reduction, and we do not think the honest and conscientious conclusion of the trial judge should be disturbed.

6. It is urged that the finding that defendant was negligent was against the overwhelming weight of the testimony and should therefore be set aside. Three passengers and the motorman and conductor testified that plaintiff attempted to alight from the car while it was in motion. Plaintiff testified that the car had stopped and suddenly started up while she was in the act of getting off. This evidence was to some extent corroborated by that of her son who was with her and who was about eight years old at the time. There is nothing intrinsically incredible about the plaintiff's evidence. It raised a jury question. We have the same situation that was before the court in *Hardy v. Milwaukee St. R. Co.* 89 Wis. 183, 61 N. W. 771, in which a verdict for the plaintiff was sustained.

By the Court.—Judgment affirmed.

KNOX, Appellant, vs. ROEHL and wife, Respondents.

March 15—April 8, 1913.

Dedication: Streets: Land owned by city: Intent: Acceptance: Evidence: Relevancy: Sufficiency: Judgment: Effect: Appeal: Review: Findings of fact.

1. Where the amount awarded to the owner in proceedings to condemn land for street purposes was paid and a conveyance taken by the city, a subsequent judgment declaring the con-

demnation proceedings void does not preclude a resort to such proceedings for the purpose of showing the intent of the city in acquiring the land so conveyed to it.

2. When a question of intent is to be determined, subsequent acts and declarations are relevant because they throw light upon the prior acts and declarations, especially where they have been consistently the same.

3. Although a city cannot directly buy land for a street, it may dedicate for street purposes land which it owns; and where a clear intent to dedicate appears only slight proof of acceptance is necessary, since it will be presumed that the city intends to accept in behalf of the public its own dedication.

4. A city began condemnation proceedings to widen a street, seeking to acquire a ten-foot strip lying east of the street and between it and defendants' land and also a strip from defendants' land. It paid to the owner of the ten-foot strip the amount awarded therefor and took a conveyance from him. Afterwards that strip was noted to be a part of the street on the official street atlas kept in the city engineer's office; and tax certificates on defendants' land described it as bounded on the west by said street. The condemnation proceedings having been held void, the city began a second proceeding to condemn the strip from defendants' land. In this proceeding the ten-foot strip was treated as a part of the street and defendants' land described as bounded on the west by the street. *Held*, that by these several acts the city unmistakably declared its intention to make the ten-foot strip a part of the street; and it is immaterial that the traveled track remained on the original street and that the ten-foot strip was more or less overgrown with weeds and grass.

5. The rule that a finding of fact by the trial court should not be set aside on appeal unless it is against the clear preponderance of the evidence, is of less force where the finding is the result of inferences drawn from undisputed facts and partakes of the nature of a conclusion of law.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Reversed.*

Action to foreclose tax certificates on defendants' property issued for unpaid special assessments for sewer and water mains laid in Island avenue, a public street in Milwaukee. The property in question is 132 feet wide, east and west, and 629.34 feet north and south; is bounded on the north by Mil-

ler avenue, extended; on the south by Concordia avenue; on the east by the Germania subdivision, and on the west by a certain ten-foot strip, which the defendants claim is no part of Island avenue, but which plaintiff maintains is a part thereof; the contention between the parties being whether defendants' property abuts on Island avenue or on this ten-foot strip. In 1889 the property lying west of defendants' land was platted, and Island avenue, thirty feet in width, was dedicated as a street between Concordia and Miller avenues. Lying immediately east of Island avenue as so dedicated was left a strip of land ten feet in width, between Concordia and Miller avenues, which remained the property of the owners of the plat until on or about October 31, 1900, when they conveyed it by warranty deed to one Walworth. In the same year condemnation proceedings were begun by the city of Milwaukee to open, widen, and extend Island avenue between Concordia and Miller avenues by adding to the thirty-foot street as dedicated the ten-foot strip mentioned and the western twenty feet of defendants' land. On April 25, 1902, the defendants herein commenced an action in the circuit court for Milwaukee county to vacate said condemnation proceedings and have the same declared null and void. By the judgment of the trial court in said action the condemnation proceedings were held null and void and were vacated because of the failure of the city to comply with sec. 3187*a*, Stats. (1898), which requires the recording in the office of the register of deeds of the final resolution or order. Upon appeal to this court the judgment was affirmed in an opinion handed down January 11, 1910. See *Roehl v. Milwaukee,* 141 Wis. 341, 124 N. W. 400. Upon the condemnation proceedings $800 were awarded Walworth for the ten-foot strip, and on the 17th of April, 1902, he conveyed the same to the city for a consideration of $800 by a warranty deed containing no limitations or reservations whatever. The strip was thereafter noted to be a part of the street by the city engineer in

the official atlas, and in each of the tax certificates herein defendants' land is described as bounded on the west by Island avenue. In 1911 the city again began condemnation proceedings to acquire the west twenty feet of defendants' land for the purpose of widening Island avenue, and in this proceeding the ten-foot strip is treated as a part of said avenue in the resolution passed by the common council and in the map accompanying the same, and the defendants' land is therein described as bounded on the west by Island avenue. The water main mentioned was laid, and all proceedings in regard thereto were taken, in the year 1906. The sewer referred to was constructed, and all proceedings in regard thereto were taken, in the years 1906–7. Both the sewer and the water main were laid in the thirty-foot strip. In some places this ten-foot strip is lower, and in some places higher, than the thirty-foot street dedicated in the plat, and has been covered with grass and weeds, and the traveled track has always been on the thirty-foot street.

The trial court found that Island avenue, at the time the water main and sewer were ordered laid and constructed, was only thirty feet wide as dedicated on the plat; that the ten-foot strip never became a part of the street; that it always intervened between defendants' property and Island avenue, and that said property at no time fronted or abutted upon said Island avenue; and held that the special assessments against defendants' property for water mains and sewer, in dispute in this case, were illegal, null, and void, and the certificates based thereon were illegal and should be delivered up and canceled. From a judgment entered accordingly the plaintiff appealed.

John J. Maher, for the appellant.

For the respondents there was a brief by *Roethke & Affeldt,* and oral argument by *George A. Affeldt.*

VINJE, J. It is conceded by the defendants that if the ten-foot strip in question was a part of the street at the time

the sewer and water-main assessments were made and levied, then the taxes for which their property was sold are valid, and plaintiff is entitled to maintain the action. But they claim the facts show the city never acquired the strip for street purposes, and that there has never been either a statutory or common-law dedication of the same for such purposes. They further contend that no reference can be had to the condemnation proceedings of 1900 for the purpose of ascertaining the intent of the city in acquiring the strip, since the judgment declaring such proceedings void invalidated them not only so far as it affected any action based thereon but for all purposes, so that no resort can be had to them for the purpose of gathering the intent of the city in commencing them. This claim strains the effectiveness of a judgment of this court to the breaking point. The proceedings may still be resorted to for the purpose of showing the intent of the city in acquiring the strip. That intent was unmistakably to make it a part of Island avenue. It is also claimed that no reference can be had to acts of the city relating to the strip since the assessments in question were made; that whether or not the strip was then a part of the street must be determined upon the facts as they then existed. This in a sense is true. Yet, when a question of intent is to be determined, subsequent acts and declarations are relevant because they throw light upon the prior acts and declarations, especially where they have consistently been the same.

It will be conceded that there has been no statutory dedication of the strip for street purposes, and that a city cannot directly buy land for a street. *Trester v. Sheboygan,* 87 Wis. 496, 58 N. W. 747. But a city may dedicate for street purposes land which it owns. The essential requisites of a valid common-law dedication are that there must be an intent to dedicate on the part of the owner and an acceptance of the dedication by the proper public authorities or by general public user. 1 Elliott, Roads & Streets (3d ed.) § 122; *Randall v. Rovelstad,* 105 Wis. 410, 81 N. W. 819. Has the city dedi-

cated this ten-foot strip for street purposes? Since the city by a dedication of its own land must not only dedicate but also accept the dedication, the questions of intent and acceptance merge more or less into each other. If, therefore, a clear intent to dedicate can be gathered, only slight proof of acceptance need be shown, for it will be presumed that the city intends to accept in behalf of the public its own dedication.

As bearing upon the intent to dedicate the following facts are significant: In 1900 the city began condemnation proceedings for the purpose of widening the street and sought to acquire not only this ten-foot strip but also twenty feet more to the east thereof, thus showing an unmistakable intention to make Island avenue sixty feet in width. Subsequent to the beginning of the condemnation proceedings it paid Walworth, the owner of the strip, $800 for the same, and thereafter the strip was noted to be a part of the street on the official street atlas kept in the city engineer's office. Thereafter tax certificates on defendants' land described the same as bounded on the west by Island avenue. In 1911 the city again began condemnation proceedings to acquire the west twenty feet of the defendants' land for the purpose of widening Island avenue, and in this proceeding the strip in question was treated as a part of the avenue in the resolution of the common council and map accompanying the same. In this resolution the defendants' land is described as bounded on the west by Island avenue. It would seem from these proceedings that the city unmistakably by these several acts declared its intention to make this ten-foot strip a part of the street. The fact that the traveled track thereof still remained on the original thirty-foot street and that the ten-foot strip was more or less overgrown with weeds and grass is quite immaterial. It is the intention to dedicate that governs, and it has been held that the recognition of a street on an official map alone is sufficient evidence of acceptance. *Steele v.*

Sullivan, 70 Ala. 589; *Schade v. Albany,* 16 N. Y. Supp. 262; 1 Elliott, Roads & Streets (3d ed.) § 169.

It seems clear, therefore, that the court erred in finding that the ten-foot strip was not a part of Island avenue at the time the assessments in question were made. We have come to this conclusion not unmindful of the rule that a finding of the trial court should not be set aside unless it is against the clear preponderance of the evidence. In this case, however, the finding is more in the nature of a conclusion of law than of fact. It is the result of inferences drawn from practically undisputed facts.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

SENGER and wife, Respondents, vs. MALLOY and another, imp., Appellants.

March 15—April 8, 1913.

Agency: Unauthorised acts: Ratification: Receipt of payments on mortgage.

1. When an agent acts in excess of the authority conferred upon him, and the person for whom he has undertaken to act is fully notified of what has been done, it becomes the duty of the latter either to affirm or disaffirm the act of the supposed agent within a reasonable time after such notice or he is bound by such act.
2. A loan broker, authorized only to collect interest on a note and mortgage which he had sold, received partial payments of the principal but did not account therefor to the owner. After the broker's death the owner discovered the facts but did not, until six or eight months later, notify the mortgagors that the broker had no right to collect the principal and that he would look to them for the amounts so paid. He also made demand of the broker's administrator for the amounts so collected, and for a considerable time accepted from such administrator payments of interest on said amounts. *Held,* that he thereby elected to ratify the acts of the broker in receiving the payments on the principal.

APPEAL from a judgment of the circuit court for Milwaukee county: OSCAR M. FRITZ, Circuit Judge. *Affirmed.*

The plaintiffs brought this action to have a mortgage for $1,600 judicially declared to be paid and satisfied and to have their title adjudged to be free and clear of such mortgage. The defendants and appellants answered denying that the mortgage was paid, and interposed a cross-complaint for the foreclosure of the mortgage, alleging that there was $700 due thereon. Prior to July 2, 1906, one Charles Trzebiatowski, who for the sake of brevity will hereafter be referred to as Charles, was engaged in the loan business, and on that day loaned to the plaintiffs $1,600 for a period of three years at five per cent. interest, taking the note and mortgage in the name of his brother *Albert*. The loan was evidenced by a note secured by the mortgage in suit. In August, 1906, Charles sold this note and mortgage to *Nora C. Malloy,* one of the defendants herein. Her codefendant, *M. J. Malloy,* acted as her agent in the transaction and the note and mortgage were delivered to *Miss Malloy*. The note was made payable at the office of Charles. The plaintiffs made the following payments of principal on the note to Charles: January 3, 1907, $250; July 3, 1907, $300; January 4, 1908, $150. None of these sums were turned over to *Miss Malloy* or her brother. Charles died in March, 1908. Shortly after his death his brother *Albert Trzebiatowski,* who will hereafter be referred to as *Albert,* was appointed administrator of Charles's estate, and continued the business individually and in partnership with one *Joseph Bejma*. After the death of Charles, *M. J. Malloy* was called in to examine his books and accounts and then for the first time discovered that any part of the principal had been paid by the plaintiffs to Charles. The interest, however, had been collected semi-annually by Charles and the amount thereof paid by him to *Miss Malloy*. The court in its opinion says that *M. J. Malloy* immediately requested *Albert* to pay over the money, and there is evidence

to this effect. After the death of Charles the plaintiffs continued to make payments to *Albert* on the principal as follows: July 1, 1908, $100; January 2, 1909, $200; June 30, 1909, $200; January 3, 1910, $200. On July 5, 1910, the sum of $100 was paid to *Joseph Bejma,* and on January 7, 1911, a payment of $100 was made to *Malloy. Albert* made the following payments to *M. J. Malloy:* July 19, 1909, $500; May 26, 1910, $200; July 11, 1910, $100. After the death of Charles, *Albert* continued to collect interest from the plaintiffs on the balance that would be due on the note if all payments made on account thereof had been indorsed thereon. *Albert* paid the semi-annual interest on the entire amount due on the note, making up the difference between the amount paid by the plaintiffs and the amount actually due to *Miss Malloy.* These interest payments were apparently accepted and received with knowledge on the part of *M. J. Malloy* that part of the interest was being paid by *Albert.* Before suit was commenced the defendant *Nora C. Malloy* assigned the note and mortgage in question to her codefendant, *M. J. Malloy.* The circuit court held that *Malloy* ratified the acts of Charles and became estopped from denying his authority to accept the payments. From a judgment entered in plaintiffs' favor the defendants *M. J. Malloy* and *Nora C. Malloy* appeal.

For the appellants there was a brief by *Carpenter & Poss,* and oral argument by *Paul D. Carpenter.*

For the respondents *Senger* there was a brief by *Rubin & Zabel,* attorneys, and *W. B. Rubin* and *A. W. Foster,* of counsel, and oral argument by *Mr. Foster* and *Mr. H. B. Walmsley.*

BARNES, J. For the sake of brevity the two Trzebiatowskis will be referred to by their Christian names. Charles was authorized to collect the interest on the note in suit, but not the principal. When *Malloy* learned what had been done

he might have disaffirmed the acts of Charles and looked to the plaintiffs for the full amount of the note, or he might have elected to affirm and ratify such acts and treat the estate of Charles as his debtor for the amount of the principal collected. It was six or eight months after *Malloy* knew that the payments had been made to Charles before he advised the plaintiffs that he would look to them for the amount so paid. *Malloy* knew that the plaintiffs paid the interest to Charles during his lifetime and continued to pay it to *Albert* after Charles's death. He was in *Albert's* office on one occasion when plaintiffs made a payment on the principal to *Albert* and did not then make any objection, except to tell *Albert* that he should not have demanded the money. He received three separate payments on principal from *Albert*. He also received from him interest paid by plaintiffs on the $900 which they admitted to be due. *Albert* paid out of his own funds or out of the proceeds of the estate of Charles the interest on the $700 collected by Charles, when such interest became due under the terms of the note. *Malloy* demanded of *Albert* payment of the amounts which Charles had collected, according to *Albert's* evidence, which the court finds to be true in the opinion rendered in the case. Such demand could only be made on the theory that *Malloy* chose to consider the estate of Charles his debtor for the moneys collected. Interest on the amounts collected by Charles could only be demanded of *Albert* on the same theory. We have (1) the fact that *Malloy* did not advise the plaintiffs that Charles had no right to collect the principal on the note until six or eight months after he knew that the collections had been made; (2) the fact that a demand was made on *Albert*, who was the administrator of his brother's estate, for the amount of principal collected by Charles; (3) the fact that for a considerable period of time interest was collected semi-annually from *Albert* on the $700 principal which Charles had collected. These facts in connection with other less persuasive ones heretofore referred to warranted the court in finding

that *Malloy* elected to ratify the acts of Charles in receiving payments on the principal.

When an agent acts in excess of the authority conferred upon him, and the person for whom he has undertaken to act is fully notified of what has been done, it becomes the duty of the principal to either affirm or disaffirm the act of the supposed agent within a reasonable time after such notice or he is bound by such act. *McWhinne v. Martin,* 77 Wis. 182, 187, 46 N. W. 118; *Saveland v. Green,* 40 Wis. 431; *Gold M. Co. v. National Bank,* 96 U. S. 640. Numerous other cases to the same effect will be found cited in 31 Cyc. 1275, and 40 Cent. Dig. tit. Principal and Agent, § 641.

The receipt of interest payments from the administrator of Charles's estate might well show ratification in itself. 31 Cyc. 1265; *Very v. Levy,* 13 How. 345. Reinforced as it is by the other significant facts referred to, the trial court's decision is well supported by the evidence.

By the Court.—Judgment affirmed.

PROGRESS BLUE RIBBON FARMS, Appellant, vs. CHICAGO HORSE SALES COMPANY, imp., Respondent.

March 15—April 8, 1913.

Principal and agent: Factors: Sale of property at auction: Payment to principal before buyer pays: Right of factor to recover from buyer.

1. **A person employed to sell another's property at auction, or a factor to whom property has been consigned for sale, has an interest in the proceeds of the sale entitling him to sue and recover the same in his own name; and in case he pays his principal in full and delivers the property before receiving payment from the buyer, and the principal accepts and retains the money, the agent becomes the sole party in interest and is entitled to recover of the buyer for his own use.**
2. **In making such payment to the principal the agent does not act as a mere volunteer.**

Progress Blue Ribbon Farms v. Chicago H. S. Co. 153 Wis. 249.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Action to charge R. C. Wirth as garnishee of W. P. Dickinson *et al.* The money, $1,665, involved, was paid into court by the garnishee and the contest was between plaintiff and the intervening defendant, *Chicago Horse Sales Company,* which claimed to be entitled thereto. It contended that when the garnishee proceedings were commenced Wirth was not liable to the principal defendants and, therefore, an action could not have been maintained by them against him.

The facts were these: The principal defendants were indebted to the plaintiff. The former consigned some horses to the intervening defendant for sale at auction. Mr. Wirth attended the sale and made purchases, in due course, so as to incur liability for $1,665. After the sale was concluded he gave the sales company a draft on one Dunbar, payable at a Milwaukee bank, for the amount of his liability. Before the draft was presented to Dunbar he was garnisheed. Therefore it was protested and returned to the sales company. The horses were shipped to Dunbar and placed in his stable before he was garnisheed. After the sales company settled with the Dickinsons for the horses Wirth was garnisheed on account of the $1,665, it being claimed that, since his draft was returned unpaid, he still owed the Dickinsons for the horses. The first garnishee proceedings were dismissed. After Wirth was garnisheed, the sales company having previously paid the Dickinsons, as indicated, it intervened in the garnishee suit, claiming that Wirth was indebted to it, not the principal defendants. Thereafter, in due course, Wirth paid the money into court.

Findings were made in harmony with the foregoing and a decision rendered thereon that the intervening defendant was entitled to the money.

For the appellant the cause was submitted on the brief of *Tullar & Lockney* and *Arthur H. Bartelt.*

William L. Tibbs, for the respondent.

MARSHALL, J. Who owned the claim against Wirth when the garnishee summons was served on him? The answer to that will answer as to whether the intervening defendant was entitled to the money paid into court to discharge the indebtedness.

It is useless to claim that the sales company paid the Dickinsons as a mere volunteer. When the company received Wirth's draft, it accepted such draft, provisionally, as payment and was warranted, as mutual agent, in doing so and advancing the amount of the draft to the Dickinsons, taking its chances on the draft being honored by the drawee. Since the sales company had no right to take anything but money as a condition of delivering the horses to Wirth, in taking the draft it became liable to the Dickinsons and the owner of the paper. Upon that being dishonored and returned, the claim against Wirth was, necessarily, revived in its favor, rather than in favor of the Dickinsons. It had no claim against the latter for the return of the money. All that is according to the natural order of things and elementary principles.

The general rule is that a person employed to sell another's property at auction, or a factor to whom property has been consigned for sale, has an interest, upon a sale being made, in the proceeds, entitling him to sue and recover the same in his own name and, in case of his paying the net proceeds and delivering the property before receiving payment from the buyer, as in this case, and the principal accepts and retains the money, the agent is entitled to recover of such buyer for his own use. The respondent was a factor. The circumstance that it was permitted to sell the property at auction did not make any difference in its status. As indicated, a factor, the same as an auctioneer, is entitled to sue for the sale price in his own name and control the litigation if the principal does not prohibit it. *Beardsley v. Schmidt,* 120 Wis. 405, 98 N. W. 235. In case of the principal receiving full payment from the agent in advance of the latter obtaining payment from the purchaser, the agent is the sole party in

interest; so, obviously, the principal has no concern in the matter between such agent and purchaser.

Under the facts of this case, there is no question but that the sales company was the owner of the claim against Wirth when the latter was garnisheed, the money as soon as paid into court was impounded for its use, and the judgment rendered, accordingly, is clearly right.

By the Court.—Judgment affirmed.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY vs. WRIGHT and another, Executors, Appellants, and KELLER and another, Respondents.

March 15—April 8, 1913.

Life insurance: Transfer of interest in policy: Validity: Delivery of duplicate assignment to company: Presumption of acceptance by assignees: Retention of policy.

1. The assured executed an "original" and a "duplicate" assignment to his mother and sister of all his right, title, and interest in a life insurance policy, reserving to himself, however, the right to exercise, for his own benefit and without the consent of the assignees, any of the tontine options provided for in the policy. The consideration expressed was "love and affection." In accordance with a provision in the policy and instructions from the insurance company he delivered the duplicate to the company to be filed, and attached the original to the policy. This was done with intent to pass the title, but he retained the papers in his own possession. Afterwards he made declarations—once in the presence of the assignees—that he had provided for them with the policy. Near the end of the tontine period he applied to the company for a loan on the policy but, on being informed that the consent of the assignees would be necessary, abandoned the matter. By his will he gave all his property to his wife and children, not mentioning his mother and sister or the policy. *Held*, that there was a complete transfer of title according to the terms of the assignment.

2. Retention of the policy in such case was not inconsistent with a transfer of title, being well explained by the fact that an interest was retained by the assignor.
3. Delivery of the written evidence of the assignment to the insurance company, with intent to transfer a right to a part or all of the insurance, was a good delivery to the assignees, their acceptance being presumed from the beneficial character of the transaction.
4. The insurance itself, not the mere policy or evidence of it, is the subject dealt with in such a transaction.

APPEAL from a judgment of the circuit court for Milwaukee county: JAMES WICKHAM, Judge. *Affirmed.*

Equitable action to determine ownership of the proceeds of a $10,000 policy of insurance on the life of Charles A. Wright.

Lillian E. Hester, sister, and *Emily S. Keller,* mother of the deceased, claimed the fund as assignees of the policy, while the personal representatives claimed the same upon the ground that, assuming the deceased attempted to assign the policy, it was not effective for failure to part with dominion over the same. Plaintiff paid the money into court, and was discharged from liability. The mother assigned her interest to the daughter and the litigation proceeded to a termination between the personal representatives and *Lillian E. Hester,* resulting in the latter prevailing.

The evidence was this, in substance: July 13, 1896, plaintiff issued the policy. It was on the semi-tontine plan, payable to the personal representatives or assignees of the assured. It contained a stipulation permitting him, at the expiration of fifteen years, the policy then being in force, to exercise either of five options as to the surplus, also this condition: "If this policy shall be assigned a duplicate of the assignment shall, within thirty days, be given to the company and due proof of interest shall be produced upon making claim."

April 21, 1899, the assured made, in due form, an assign-

ment in duplicate, purporting to convey the policy to *Emily S. Keller,* his mother, and *Lillian E. Hester,* his sister, reserving the right to exercise any of the options for his own benefit, without consent of the assignees, providing for a right of survivorship as between them, and for the policy to go to his estate in case of neither of the assignees surviving until maturity of the policy. The consideration expressed was "love and affection." One of the papers was marked "Original" and the other "Duplicate." The forms were prepared by plaintiff for such matters and sent to agents to enable them to accommodate policy-holders. The forms were in sets, one to be regarded as the original and the other a duplicate. At the foot of the former there were these words of instruction: "This original should be attached to the policy," and at the foot of the latter: "This duplicate must be sent to the home office to be filed." The executed paper marked "Duplicate" was so sent by the assignor, placed on file, and duly receipted for to him. *Mrs. Keller,* in January, 1912, was seventy-seven years of age. In 1905, the assured said to a friend that he had provided for his mother and sister with the insurance policy. In 1907, in the presence of his sister, his mother, and her husband, the assured's stepfather, he made a like declaration. In 1910, he applied to plaintiff for a loan on the policy; but, upon being informed that consent of the assignees would be necessary, abandoned the matter. At about this time he was solicited by plaintiff's agent to take additional insurance and asserted that his mother and sister were provided for by the insurance he had, and that, as to the rest of the family, there was enough. He died testate May 17, 1911. The will, in terms, exhausted all his property in provisions for his wife and children. The insurance policy with the assignment aforesaid, executed with all formalities, including government revenue stamps to the amount of $8, was found in his safety deposit box. There was found in the same box stock certificates belonging to

Lillian E. Hester. The findings of fact were in accordance with the foregoing.

For the appellants there were briefs by *Ball & Stone* and *Doerfler, Green & Bender,* and oral argument by *Harrison S. Green* and *Walter H. Bender.* They cited, among other authorities, 19 Am. & Eng. Ency. of Law (2d ed.) 94; *Foster v. Gile,* 50 Wis. 603, 7 N. W. 555; *Northwestern M. L. Ins. Co. v. Collamore,* 100 Me. 578, 62 Atl. 652; *Trough's Estate,* 75 Pa. St. 115; *In re Crawford,* 113 N. Y. 560, 21 N. E. 692; *Scott v. Dickson,* 108 Pa. St. 6; *Spooner's Adm'r v. Hilbish's Ex'r,* 92 Va. 333, 339, 23 S. E. 751; *Ingersoll v. Pond,* 108 Va. 179, 60 S. E. 738; *Williams v. Chamberlain,* 165 Ill. 210, 46 N. E. 250; *Weaver v. Weaver,* 182 Ill. 287, 55 N. E. 338; *Huestis v. Prudential L. Ins. Co.* 127 App. Div. 903, 111 N. Y. Supp. 461; *Morrill v. Manhattan L. Ins. Co.* 183 Ill. 260, 55 N. E. 656; *Hayes v. Boylan,* 141 Ill. 400, 30 N. E. 1041; *Chadwick v. Webber,* 3 Greenl. (Me.) 141, 14 Am. Dec. 222; *Dudley v. Nickerson,* 107 Me. 25, 78 Atl. 100; *Dexter S. Bank v. Copeland,* 77 Me. 263; *Opitz v. Karel,* 118 Wis. 527, 533, 95 N. W. 948.

For the respondents there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *F. L. McNamara.*

MARSHALL, J. This appeal is governed by a few elementary principles,—principles so firmly established and so frequently applied that they need but to be stated. Therefore, we shall not discuss the numerous authorities cited to our attention, except in a general way, or refer to any considerable extent to precedents, other than to cite them.

In every transfer of title from one person to another there must be an actual or constructive delivery of the thing or paper title thereto from one to the other, with intention to pass title, and an actual or constructive acceptance, completing mutuality so as to end dominion on the one side and create it on the other.

In order to pass title, no physical transition of the thing involved, or paper representing it, from the old to the new owner is necessary; a tradition, good in law, is sufficient. A delivery and acceptance may be good in law and there not be any physical circumstances of change direct from the old to the new one, or even present knowledge on the part of the latter. The transition may be accomplished by acts or words, or both, showing intention to part with title and deprivation of dominion over the thing or paper calling therefor. No particular act on the part of the vendee or assignee is necessary to complete the mutuality, disabling the vendor or assignor from recalling the title he intends to part with. The instrument of transfer may be delivered to a third person, with intention not to recall it, and the transaction be complete, even as indicated, without the new owner having present knowledge thereof. The delivery to the third person and acceptance by him for the purposes of the transaction is a delivery to the new owner,—where such transaction is beneficial to the new owner, the law supplies the rest; acceptance by such new owner is presumed until the contrary is shown,—thus ending the dominion of the old owner and initiating that of the new one. The following adjudications amply illustrate the foregoing: *Cooper v. Jackson,* 4 Wis. 537; *Tisher v. Beckwith,* 30 Wis. 55; *Bogie v. Bogie,* 35 Wis. 659; *McPherson v. Featherstone,* 37 Wis. 632; *Kittoe v. Willey,* 121 Wis. 548, 99 N. W. 337; *Wells v. Wells,* 132 Wis. 73, 111 N. W. 1111; *Whiting v. Hoglund,* 127 Wis. 135, 106 N. W. 391; *Bates v. Winters,* 138 Wis. 673, 120 N. W. 498; *Taft v. Taft,* 59 Mich. 185, 26 N. W. 426; *Eastham v. Powell,* 51 Ark. 530, 11 S. W. 823; *Shoptaw v. Ridgway's Adm'r* (Ky.) 60 S. W. 723.

It will be observed that the dominant circumstances in a case involving the question of whether, in a case of this sort, there was an efficient delivery, are whether the acts or words, or both, evince an intent to pass title, and whether dominion

over the subject was surrendered in favor of the new owner. Here those circumstances and the ultimate fact were found in favor of respondents. So the question is; Are the findings in that regard warranted by the evidence?

There is no difficulty as to whether there was a sufficient consideration to support the transfer. The two papers were duplicate originals. The fact that one was denominated by a printed notation thereon "Duplicate" and the other "Original," does not give any particular significance to the latter over the former. The intention to pass title by delivering one of the papers to the insurance company and attaching one to the policy, thus fully complying with all the regulations in the insurance contract, is quite manifest. That is reinforced by the fact that the deposit of one with the company was made rather as evidence to it of a transfer having already occurred than as an essential step in making such transfer. That is to say, such circumstance involved a written declaration of a consummated act. From the beneficial character of such a transaction, acceptance is presumed until the contrary is shown. Manual keeping of one of the papers was consistent with surrender of dominion over the subject dealt with to the extent of the interest therein which was assigned, because of Mr. Wright having reserved to himself a very substantial part of the insurance contract. The right to enjoy all of the optional features, which awaited the expiration of the tontine period of fifteen years having been retained, he was as much entitled to hold the policy as the assignees subject to the rights reserved. The fact that he applied for a loan on the policy after the assignment, does not militate greatly, if at all, against the otherwise manifest intent to assign, in part, since such application was made near the end of the tontine period,—at a time when he might well have thought his interest would be accepted as security for the amount sought to be obtained. That both he and the insurance company supposed the policy, subject to the reservation, had passed to the as-

signees beyond recall, is clear, because the company refused to make the loan without their consent, and Mr. Wright refused to apply to them for leave to incumber their interest. That the whole policy was not assigned, is of no significance against respondents, since it was competent for Mr. Wright to assign part and retain part, according to his intent as shown by the papers executed. Moreover, retention by him of an interest in the policy is a circumstance in favor of respondents, as it explains why he retained the paper.

If in view of all the circumstances mentioned, there were anything left to show, conclusively, an executed intent on the part of Mr. Wright to divest himself of dominion over the insurance to the extent mentioned in the assignment, it is furnished by declarations to the assignees and others that he had made provision for the former out of the insurance. It is also significant that, while he showed much concern for the pecuniary welfare of his mother and sister after his death, he omitted mention of them in his will and any special reference therein to the policy. That is consistent only with the idea that they had been otherwise provided for by the insurance.

On the whole case, it seems quite clear that the delivery of one of the duplicate originals of the assignment to the insurance company was a good surrender of dominion over the policy to a third party for the benefit of the assignees. Mr. Wright could not thereafter have recalled what he had done without their consent, as he understood himself and the company. Thereafter it held the assignment to protect itself and as trustee of the assignees as well, and he retained the policy with the other duplicate assignment attached thereto as owner of the reserved interest therein and as trustee.

An examination of the authorities cited by counsel for appellants does not enable us to find anything therein particularly out of harmony with the foregoing. In no one of them are the facts the same as those here, and, if there be anything

said in any of them out of harmony with the principles stated, the principles, not the adjudications, must prevail. Every essential to a transfer of title, according to the terms of the assignment, is shown. There was a good consideration, a manifest intent to transfer title and a good delivery, notwithstanding the evidence of the insurance obligation, the policy, remained in Mr. Wright's possession. If the policy had been destroyed the insurance and interest of the assignees therein would have remained just the same.

The principles above stated,—that in case of an assignment, as in this case, retention of the policy is not inconsistent with a transfer of title, and is well explained by the circumstance that an interest is retained by the assignor; that delivery of written evidence of an assignment to the insurance company with intent to transfer a right to part or all of the insurance, is a good delivery to the intended new owner; and that the insurance, not the mere policy or evidence of it, after all, is the subject dealt with,—will be found well established as indicated by many adjudications. Those cited by counsel for respondents seem to have been well selected. Among them are the following in connection with others referred to therein: *Hurlbut v. Hurlbut,* 49 Hun, 189, 1 N. Y. Supp. 854; *Young v. Young,* 80 N. Y. 422; *Hutchings v. Miner,* 46 N. Y. 456; *Martin v. Funk,* 75 N. Y. 134; *Burges v. New York L. Ins. Co.* (Tex.) 53 S. W. 602; *McDonough v. Ætna L. Ins. Co.* 38 Misc. 625, 78 N. Y. Supp. 217; *Abegg v. Hirst,* 144 Iowa, 196, 122 N. W. 838; *Barnhouse v. Dewey,* 83 Kan. 12, 109 Pac. 1081; *Otis v. Beckwith,* 49 Ill. 121; *Colburn's Appeal,* 74 Conn. 463, 51 Atl. 139; *Wilson v. Hicks,* 23 Ont. Law Rep. 496; *Towle v. Towle,* 114 Mass. 167; *O'Neil v. Greenwood,* 106 Mich. 572, 64 N. W. 511; *Gould v. Day,* 94 U. S. 405.

We do not fail to note the distinction between the facts of many of the cases cited and the one before us, pointed out by counsel for appellants; but, they are mere differences in de-

tail bearing, mainly, on the evidentiary effect of circumstances as regards whether there was an intent to transfer title and a delivery, actual or constructive, good in law, to divest one of title and dominion over the subject dealt with by transferring such title and dominion to another. The fact that the insurance company in *Wilson v. Hicks, supra,* notified the assignee of the assignment and did not in this case, is not of any great significance. Neither is the fact that the assignment delivered to the company was marked "Original" instead of "Duplicate," nor that in *Hurlbut v. Hurlbut, supra,* there were two papers and both delivered to the insurance company, nor that in *McDonough v. Ætna L. Ins. Co., supra,* there was but one paper, and that was so delivered. All the decisions are to the effect that neither failure to deliver the assignment or policy into the manual possession of the assignee, nor retention of such possession by the assignor of the policy, is vital.

It is suggested by counsel that *Otis v. Beckwith, supra,* was modified in *Williams v. Chamberlain,* 165 Ill. 210, 46 N. E. 250, and overruled in *Weaver v. Weaver,* 182 Ill. 287, 55 N. E. 338. We do not find it so. The principle of the early case is affirmed in both the later ones. It is not referred to, specifically, in *Weaver v. Weaver.* Whether the mere delivery of a duplicate assignment to the insurance agent, according to a requirement of the policy in case of a transfer, is of itself conclusive of an intention to pass title and of disablement of the assignor to deal with the subject of the transaction under such peculiar circumstances as existed in the *Weaver Case,* is all that was there decided; while the general rule was most emphatically affirmed. The court quoted with approval from *Weber v. Christen,* 121 Ill. 91, 11 N. E. 893. "Did the grantee by his actions or words or both intend to divest himself of the title? If so, the deed is delivered."

It is quite useless to point out distinctions between a case in hand and previous adjudications here or elsewhere, there

being no distinction in principle. The keynote of an adjudication is the ruling principle. The details showing the particular facts ruled by some particular principle are helpful; but, in the end, it is the principle, not the detail circumstances, commonly evidentiary only, which is the important feature as to whether an existing adjudication is a safe guide to follow in a case, presently. Mere details may widely vary, as indicated in the cases cited, yet the ruling principle be the same. Where the circumstances show a clear intent to transfer title and an execution thereof by surrender of dominion over the subject dealt with, actually or constructively,—not necessarily a parting with the thing directly to the transferee,—so as to disable the old owner from efficiently recalling his act, the transaction is complete though, in case of an insurance obligation, as here, the evidence of the insurance remains in possession of the assignor.

By the Court.—Judgment affirmed.

RICHTER, Appellant, vs. UNION LIME COMPANY, Respondent.

March 15—April 8, 1913.

Master and servant: Negligence: Injury: Fellow-servants: Rules and regulations: Unsafe place and tools: Insufficient help.

1. Plaintiff, a teamster in defendant's stone quarry, having been called to assist a driller and two other employees in moving a heavy drill down an incline or bench in the quarry, and having been injured by the tipping over of the drill, due to the manner in which the four men handled it, no recovery for such injury can be had on the ground that the other men or any of them were negligent, since all were fellow-servants and engaged in the common employment of moving the drill at the time of the accident. The driller was not, under such circumstances, a vice-principal.
2. It appearing that the drillers had adopted proper methods for moving the drills in the quarry and that there was no occa-

sion for any different rules, defendant could not be held liable on the ground of a failure to promulgate proper rules and regulations.

3. The benches and irregularities of surface in the quarry being the necessary result of its operation, the rule requiring the master to furnish a safe working place is inapplicable; and the accident not having been caused by any defect in the drill or appliances, the rule requiring the furnishing of safe tools and appliances has no application.

4. No negligence of defendant in failing to furnish sufficient men was shown, it appearing that four men were enough to move the drill, that it was usually moved by three, and that other men were near by who might be and customarily were called when necessary.

APPEAL from a judgment of the circuit court for Calumet county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This action was brought to recover for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. At the close of the plaintiff's evidence the court below granted the defendant's motion for nonsuit. Judgment was entered accordingly, from which this appeal was taken.

J. E. McMullen, for the appellant.

For the respondent there was a brief signed by *Quarles, Spence & Quarles,* attorneys, and *I. A. Fish,* of counsel, and oral argument by *Mr. Fish.*

KERWIN, J. It appears from the evidence that plaintiff was twenty-one years of age and had been employed in a stone quarry, operated by defendant, as a laborer, and at the time of the injury was working as teamster. The rock in the quarry was loosened by means of blasting, and in the work of removing it benches were formed at different heights. Two large compressed air drills were used for making blast holes in the benches. They consisted of an iron tripod with a vertical slide, at the top of which worked a large cylinder, to the piston of which cylinder was fastened the drill. The cylinder could easily be removed from the slide. The whole

contrivance, when the cylinder was up, was about seven feet high and weighed about 700 pounds. Three weights were attached to the legs of the tripod when the drill was in operation. A small drill was used in the quarry, known as the plug drill. Two drillers worked in the quarry, Frich and Prince. Prince usually ran the plug drill and Frich one of the large drills. The plug drill was used for drilling holes in pieces of rock which had been detached or thrown out by the blasting. When Frich was away Prince ran the large drill. It became necessary in carrying on the work to move the large drills, and it was the custom of the driller to call upon any of the men working in the quarry to assist him in this work. Two men and the driller usually moved it. The leg weights were taken off, and a man took hold of each leg of the tripod and carried or dragged the drill along over the inequalities in the surface of the ledge a few inches in height without detaching the air hose or lowering the cylinder. If a bench of several feet in height were to be passed, it was customary to remove the air hose and cylinder and slide the parts down on planks. If a ledge from eighteen inches to three feet in height were to be passed, it was the custom to remove the air hose, lower the cylinder, close up the tripod, and slide the drill over. Prior to the injury plaintiff had assisted in moving the drill and had hauled it in his wagon.

On July 28, 1910, Prince was operating one of the large drills and called two men to assist him move it. He removed the leg weights, but left the cylinder up and the air hose attached. The three men began to move the drill down an incline, estimated from ten to eighteen inches. Plaintiff was then working in the bottom of the quarry, and as he was passing the three men engaged in moving the drill he was called to help them. Prince told him to take hold of the leg of the drill on the lower side, Prince being on one side of this leg and plaintiff on the other. Each of the other two men had hold of a leg of the tripod. They all attempted to move

the drill in this way, and while so doing it tipped over, catching plaintiff under it, and seriously injuring him.

Upon the undisputed evidence, plaintiff, Prince, and the other two men were engaged in the common employment of moving the drill at the time of the injury. There was no defect in the drill. The benches and irregularities in the place of operation in the quarry were the necessary result of the work which was being carried on. The accident was caused, as appears clearly from the evidence, by the manner in which the four men actually engaged in moving the drill handled it at the time. Prince, plaintiff, and the other two men had hold of the drill and participated in an effort to move it, and in that act they were clearly fellow-servants. So that the negligence of Prince, the other two men, or either of them, was the negligence of a fellow-servant of plaintiff, hence he cannot recover. *Hamann v. Milwaukee B. Co.* 127 Wis. 550, 106 N. W. 1081; *Knudsen v. La Crosse S. Co.* 145 Wis. 394, 130 N. W. 519; *McKillop v. Superior S. Co.* 143 Wis. 454, 127 N. W. 1053; *Klochinski v. Shores L. Co.* 93 Wis. 417, 67 N. W. 934; *Peschel v. C., M. & St. P. R. Co.* 62 Wis. 338, 21 N. W. 269.

The evidence shows that the plaintiff was familiar with the drill and the conditions surrounding the work of moving it, and when he engaged with Prince and the other two men in the work of moving the drill, as the evidence shows, all the parties so engaged were fellow-servants in the performance of that work. The case made by the evidence brings us clearly within the decisions of this court which forbid recovery where the negligence causing the injury is that of a fellow-servant engaged in the same line of employment.

Appellant in his brief insists that the defendant was guilty of several breaches of duty, namely: (1) in not promulgating proper rules and regulations; (2) in failure to furnish a safe place to work; (3) failure to furnish safe tools and appliances; (4) that Prince was a vice-principal; (5) that de-

fendant did not furnish sufficient men. We think all these contentions must be resolved against the appellant. The evidence does not show a proper case for the promulgation of rules and regulations, or any negligence in that regard. On the contrary, it appears that the drillers had adopted proper methods for moving the drills, and there was no occasion for any different rules. Nor does it appear from the evidence that the master ever had notice of the necessity for any other or different rules. Under the circumstances no rules were necessary. *Pern v. Wussow,* 144 Wis. 489, 129 N. W. 622; *Knudsen v. La Crosse S. Co., supra; Glenesky v. Kimberly & C. Co.* 140 Wis. 52, 121 N. W. 893; *Brotzki v. Wis. G. Co.* 142 Wis. 380, 125 N. W. 916.

The contention that defendant failed to furnish a safe place to work is without merit: the condition of the place was necessarily created by the operation of the quarry. The rule which requires the master to furnish a safe working place has no application to the instant case. *Knudsen v. La Crosse S. Co., supra.* Nor is there any merit in the contention that the defendant failed to furnish safe tools and appliances. There is no evidence that the drill was defective in any way or out of repair. The injury occurred by the moving of the drill, not because of any defect in the drill or appliances.

Prince was not a vice-principal. While engaged in the operation of assisting in moving the drill he was engaged in the common employment with the other men in handling and moving the drill. He was simply a fellow-servant while engaged in that capacity with other men who worked with him. *Klochinski v. Shores L. Co.* 93 Wis. 417, 67 N. W. 934; *Knudsen v. La Crosse S. Co., supra.*

The claim that the defendant was negligent in not furnishing sufficient men cannot be sustained. The evidence does not show that an insufficient number of men had been furnished. On the contrary, it shows that four men were sufficient, and that the drill was usually moved by three. More-

over, other men were in the immediate vicinity, and if their services had been necessary they could have been called, since it was the custom to call such men as were necessary. So, even if it were conceded that more men were necessary, the failure to call them was not the negligence of the defendant, but of a fellow-servant. *Dunlap v. Barney Mfg. Co.* 148 Mass. 51, 18 N. E. 599.

We think it clear upon the undisputed evidence that no case was made by the plaintiff, therefore a nonsuit was properly ordered.

By the Court.—Judgment is affirmed.

NOVITSKI, Respondent, vs. WAITE GRASS CARPET COMPANY, Appellant.

March 15—April 8, 1913.

Master and servant: Injury from defective machinery: Physical impossibility: Questions for jury: Assumption of risk: Contributory negligence: Special verdict: Form: Appeal: Review: Harmless errors.

1. A verdict which the trial court has refused to set aside should not be disturbed on appeal, in disregard of the common sense of the jury and the learning and experience of the trial judge, upon mere theories of impossibility based upon literal interpretation of oral discourse, estimates of time, distance, and quantity, and impeccability of defendant's witnesses.
2. Plaintiff, an employee in defendant's matting factory, was injured while baling dried swamp grass with a hay-press. He testified that a lever used in operating the press had been broken and twice repaired by defendant's foreman; that at the time of the last repair the foreman assured him that it was all right and directed him to continue work; and that three days later, while he was pulling this lever, it gave way, causing him to lose his balance and fall against the machine in such a way that his arm was caught and injured. Upon conflicting evidence which defendant claimed to show that it was physically impossible that the accident could have happened in

that way, it is *held* that it was a question for the jury whether plaintiff sustained his injuries substantially in the manner described by him.

3. In such case the repair by the foreman and the direction to continue work with the machine as repaired were equivalent to an assurance of safety and went to excuse plaintiff's return to and continuance of work notwithstanding his knowledge of the former defect.

4. The questions of contributory negligence and assumption of risk in such case were so closely related that there was no prejudicial error in refusing to submit a separate question as to the latter in the special verdict, where the court instructed the jury concerning assumption of risk in that part of the charge relating to defendant's negligence, but was not requested to and did not instruct upon that subject in the part relating to contributory negligence.

5. The trial court may properly refuse to submit questions proposed for the special verdict which relate merely to details of evidence and the answers to which would determine no issue.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Weed & Hollister,* and oral argument by *H. I. Weed.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *J. F. Martin* and *G. F. Clifford.*

TIMLIN, J. The respondent had judgment in the court below against the appellant on a special verdict finding (1) that the lever of the hay-press was broken, out of place, or defective at the time plaintiff was injured; (2) the defendant was guilty of negligence in suffering and requiring plaintiff to operate said press in the condition it was at the time of accident; (3) this defective condition was the proximate cause of plaintiff's injury; (4) the defendant in the exercise of ordinary care and prudence ought to have anticipated an injury to plaintiff from such defective condition; (5) the plaintiff was not guilty of any want of ordinary care and prudence which contributed to the injury; (6) the plaintiff's

damages are $7,000. These damages were reduced by the circuit court to $6,000.

Errors assigned by the appellant may be reduced to two, viz.: (1) the evidence is insufficient; (2) other questions requested should have been submitted in the special verdict. There was evidence from which the jury might have found that in a factory engaged in making grass matting from dried swamp grass or hay the plaintiff was engaged in collecting and baling the refuse or waste upon a machine practically identical with a hay-press and in bundles resembling the ordinary bales of hay. This press was operated from the power in the building, and the plaintiff's duty was to pitch in the hay, press it, wire the bales, and in doing so pull back a lever used to drop a block which separated the bales. The feed board on which the hay was thrown had iron teeth in it and worked automatically, carrying and pushing down the loose hay into the hold or receptacle of the machine in which it was pressed into a bale. The lever mentioned was out of repair at the lower end near its fulcrum or fastening where the casting was broken. This broken casting had been drilled and a short bolt or set-screw set in to take the place of a former projecting piece of the casting. The plaintiff brought the attention of the defendant's foreman to this defect, the latter caused a bolt or set-screw to be inserted, plaintiff returned to work, this bolt or set-screw came out during the work, plaintiff again notified the foreman, who took the old bolt or set-screw out and inserted a new or longer one, with which the plaintiff then worked three days and until the time he was injured. At the time of last repair the foreman assured plaintiff the repair was all right and ordered him to go ahead. While in the act of pulling the lever forward with his right hand for the purpose of dropping the block, this bolt or set-screw again came out unexpectedly, by reason of which, together with his exertion in throwing the lever, the plaintiff apparently lost his balance, fell against the machine,

and had his right arm caught below the elbow by the teeth in the feed board, tearing the flesh off the bone down to the wrist and necessitating the amputation of the arm above the elbow joint.

One contention of appellant's counsel is that, the top of the hay-press being fifty-seven and one-half inches from the floor, it was impossible that this accident could have happened in the way stated by plaintiff. The plaintiff, however, testified that he was at the time standing upon an accumulation of hay or refuse which elevated him two or three feet above the floor. This is met by the claim on the part of appellant's counsel that on his preliminary examination he testified that he stood on the floor, and that it was impossible that he should have gathered and pressed twenty-five bales of hay in the forenoon of that day, as he says he did, and also have covered the floor with hay outside the press to the height mentioned. It is also urged that four witnesses on the part of the defendant testified that the floor was practically clear of hay about the press immediately after the injury. We do not find evidence which supports any such argument. The plaintiff did not, we think, testify that the whole floor was covered with hay to the height mentioned at the time of his injury, nor did defendant's witnesses agree that there was no hay on the floor near the press at that time. Taken all together they merely differed from the plaintiff in their estimate of the quantity then on the floor near the press. By accepting literally the words "stood on the floor," and the estimate of twenty-five bales, and fixing a certain weight for each of the unweighed bales and accepting as mathematically exact the estimate of the time required to make one bale, and considering the number of minutes included in the forenoon's work and the number of machines and the estimated distance, it is figured out to be physically impossible that there should be such an amount of hay on the floor at the time in question. This seems to be carrying the theory of physical impossibility

beyond its legitimate bounds. Even without this hay the accident substantially as testified to by the plaintiff is by no means impossible. The question whether the plaintiff sustained his injuries substantially in the manner described by him was a proper subject for argument to the jury and to the circuit court on motion for a new trial. The practical common sense of the one and the learning and experience of the other are not to be disregarded upon mere theories of impossibility based upon literal interpretation of oral discourse, estimates of time, distance, and quantity, and impeccability of defendant's witnesses.

On the question of contributory negligence or assumption of risk, which in this case are so cognate that no sound reason can be given for their separation, the repair by the foreman and the directions to continue work with the machine as repaired were equivalent to an assurance of safety. *Holloway v. H. W. Johns-Manville Co.* 135 Wis. 629, 116 N. W. 635; *Jakopac v. Newport M. Co., ante,* p. 176, 139 N. W. 1060. It went to excuse the return to work and the continuance of work on the part of plaintiff, notwithstanding his knowledge of the former defect, because of the repair and the instruction to proceed with the implement as repaired. If the repair had been clearly and manifestly insufficient or if no repairs had been made, a different question might arise which we are not called upon to decide in this case.

Upon the second subdivision of the assignments of error the questions requested by defendant were the following:

"(1) Could plaintiff's arm come in contact with the feed board of the hay-press if he operated the lever in the usual way? (2) When plaintiff was hurt, was the lever in the place it usually occupied after a block had been dropped into the machine? (3) Did the plaintiff assume the risks?"

With reference to the first question above quoted, neither a negative nor an affirmative answer thereunto would have settled any issue made by the pleadings upon which this case

turns. We must assume that the appellant expected that the jury might answer this in the negative, but what if they did? No doubt operating the lever in the usual way would not bring the plaintiff's arm in contact with the feed board. The negative answer would settle nothing material and nothing that would change the result if added to the questions actually submitted. It is a mere detail of evidence, tentative, partial, and inconclusive. The same is true of the second proposed question. With reference to the third question, this was a case within the authorities where the circuit court in his discretion was authorized to cover the question of assumption of risk and contributory negligence by the finding actually made. The question of assumption of risk arising from the ordinary operation of this machine when in repair is not what is under investigation. That would be quite immaterial to the case as made by the plaintiff. The defendant's evidence tended to show that this lever fastening was not broken and repaired and broken again and repaired again or broken at all while the plaintiff worked on it. The plaintiff's evidence tended to show that it was so broken and repaired and that he was injured because of the defective lever resulting from the inadequacy of such repairs. Upon this he must recover or not at all. Therefore, so far as assumption of risk is relevant to the case made by the plaintiff, it is assumption of the risk of working with the lever so repaired. There is no affirmative evidence that plaintiff was conscious of any defect existing after the last repair except such as the repair itself would indicate, and as to that he had the assurance proceeding from the act of repair and the order to continue work. The evidence of assumption of risk by working at this machine after the last repair is therefore quite shadowy, and even if we were to assume that it was not covered by the question relating to contributory negligence the failure to submit the separate question is not shown to have been prejudicial. But in a case like this the question of as-

sumption of risk is sufficiently covered by the contributory negligence question, although the court should have instructed, and probably would if requested have instructed, the jury that the question covered assumption of risk. The court did not instruct concerning assumption of risk in that part of his charge relative to the fifth question, but did in that part relating to the second question. We think there was no prejudicial error shown in this respect within the rule of *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633, and cases there cited.

The learned circuit judge expressly passed upon the damages and reduced by the proper order the sum awarded by the jury to $6,000. We think the case mainly turns upon questions of fact in this as in other respects, and we are of opinion that the judgment should be affirmed.

By the Court.—Judgment affirmed.

SALTZSTEIN, Respondent, vs. NAHMENS, Appellant.

March 11—April 29, 1913.

Milwaukee civil court: Defective appeal to circuit court: Jurisdiction: General appearance: Appeal to supreme court: Reversal of judgment: Striking cause from calendar.

1. An attempted appeal from the civil court of Milwaukee county is ineffective unless the notice of appeal and affidavit of good faith are served upon the civil judge; and a mere general appearance of the parties in the circuit court without a trial *de novo* does not cure the defect. *Manufacturers & M. I. Bureau v. Everwear H. Co.* 152 Wis. 73, distinguished.
2. On appeal in such a case from a judgment of the circuit court affirming a judgment of the civil court, the supreme court acquires jurisdiction of the case sufficiently to reverse the judgment of the circuit court for lack of jurisdiction there.
3. In such a case a motion to strike the cause from the calendar of the supreme court, made by the appellant in order to save himself from an affirmance of the judgment under the rule because of his default in serving his printed case and brief, will be denied.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

Alfred Klingelhoefer, for the appellant.

For the respondent there was a brief by *Michael Levin,* attorney, and *B. F. Saltzstein, in pro. per.,* and oral argument by *Mr. Levin.*

The following opinion was filed January 28, 1913:

PER CURIAM. In December, 1911, this action of garnishment was commenced in the civil court of Milwaukee county by the issuance of a summons in garnishment in aid of an execution. Judgment against the garnishees having been rendered in that court, *Nahmens,* the execution debtor, attempted to appeal to the circuit court, but did not serve his notice of appeal on the judge of the civil court who tried the case. Both parties appeared generally in the circuit court and, on motion of the respondent, the judgment of the civil court was affirmed, whereupon *Nahmens* appealed to this court. The case being regularly on the calendar and reached for argument in this court, the appellant (being in default as to the service of case and brief under the rules) moved to strike the case from the calendar on the ground that this court had no jurisdiction of the action, because of the fact that the appeal to the circuit court was not properly perfected.

After consideration of the motion the court deems that it should not be granted. It is true that the appeal to the circuit court was not properly taken and the circuit court obtained no jurisdiction of the case thereby. *Fred Miller B. Co. v. Milwaukee,* 150 Wis. 336, 136 N. W. 157. Whether the circuit court subsequently acquired jurisdiction by the general appearance of the parties without objection in that court, we do not decide. Even if no jurisdiction was acquired by the circuit court, it does not follow that the appeal to this court must be dismissed or stricken from the calendar. In such a case this court acquires jurisdiction of the case

sufficiently to reverse the judgment because of the lack of jurisdiction below. Such was the course in the *Miller Case*, and such is the established doctrine of this court. *Kidder v. Fay*, 60 Wis. 218, 18 N. W. 839.

In the affidavits filed there is considerable support for the idea that the appellant resorted to this expedient in order to save himself from an affirmance of the judgment under the rule because of his default in serving his case and brief. This court is not disposed to allow injustice to be done in this way if it be possible to avoid it. The motion to strike from the calendar will be denied with $10 costs to be paid within ten days. Upon the payment of $25 to the respondent's attorney, the appellant will be permitted to serve his case and brief within ten days from this date, the respondent's brief to be served within twenty days from this date; and the case will then be placed on the March assignment for argument. In the event that the appellant fails to serve his case and brief as allowed in this order, the judgment below will be affirmed upon the filing of proof of that fact by affidavit.

It is so ordered.

The following opinion was filed April 29, 1911:

SIEBECKER, J. This is an appeal by the defendant in the original action from a judgment of the circuit court for Milwaukee county affirming a judgment of the civil court of Milwaukee county in the garnishment proceedings.

On December 6, 1911, garnishment proceedings in aid of execution for the collection of a judgment against the defendant in the principal action, *Paul M. Nahmens*, were commenced in the civil court of Milwaukee county against the C. R. Gether Company, a corporation, and C. R. Gether individually, as garnishees, by the issuance of a summons on the affidavit of Michael Levin, an attorney for *B. F. Saltz-*

stein, the assignee of the judgment of the Carl Worst Advertising Service, plaintiff in the principal action.

On December 17th, the return day of the summons in the garnishment proceedings in the civil court, that court awarded judgment against the garnishees. The garnishee defendants by their attorney moved for a stay of proceedings, which was granted.

On December 19th the defendant in the original action attempted to appeal from the judgment in the garnishment proceedings to the circuit court for Milwaukee county by serving a notice of appeal and affidavit of good faith on the clerk of the civil court. This notice of appeal and affidavit were not served on the judge of the civil court wherein the judgment against the garnishees was awarded and from which court the records in the garnishment proceedings were returned by the clerk of the civil court to the circuit court for Milwaukee county.

Upon motion in the circuit court that court affirmed the judgment of the civil court and directed that judgment be entered in the action in the circuit court against the garnishees and against the surety on the appeal bond. The defendant in the original action appealed to this court from the judgment of the circuit court in the garnishment proceedings.

As declared in the case of *Fred Miller B. Co. v. Milwaukee,* 150 Wis. 336, 136 N. W. 157, the notice of appeal and the affidavit of good faith required for taking an appeal from the civil court of Milwaukee county to the circuit court for such county must be served on the judge of the civil court. This is required under the provisions of ch. 549, Laws of 1909, and to which reference is made in the opinion of the above cited case. As there indicated, under the state of the record before us in this case, showing that the notice of appeal and affidavit of good faith were not served on the judge of the civil court, it must be held that no appeal from the civil court was taken in this action and that the circuit court

was without jurisdiction to make the order and award the judgment appealed from. The proceeding in the circuit court in this case did not cure the jurisdictional defect, as was held to be the result in the case of *Manufacturers & M. I. Bureau v. Everwear H. Co.* 152 Wis. 73, 138 N. W. 624, where no motion to dismiss or objection to the jurisdiction was made and the parties appeared in the circuit court and tried the case *de novo*.

By the Court.—The judgment appealed from is reversed.

PLEWA, Appellant, vs. ST. JOSAPHAT'S CONGREGATION and another, Respondents.

March 15—April 29, 1913.

Debtor and creditor: Fraudulent conveyances: Voluntary assignment.

1. A conveyance of real property by an insolvent debtor, which the plaintiff seeks to have set aside on the ground that it was fraudulent as to creditors, is *held* to have been free from fraud, either actual or constructive, it appearing that the property was worth but $400,000 and was incumbered by a mortgage for $200,000; that the grantee assumed the mortgage and also agreed to pay seventy-five per cent. to the unsecured creditors, which aggregated over $200,000; and that all creditors have been paid said percentage except plaintiff, and said percentage has been tendered to him.
2. The fact that such conveyance was not made in compliance with the statute (sec. 1694, Stats.) governing voluntary assignments for the benefit of creditors, does not render it void.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This action was brought to set aside a conveyance of certain real estate in the city of Milwaukee on the ground that it was conveyed to defraud creditors. The complaint alleges the recovery of judgment against the defendant *St. Josa-*

phat's Congregation; the return of execution thereon; that the judgment remains unpaid; that before the rendition of such judgment against the defendant *St. Josaphat's Congregation* the real estate in question was deeded to the defendant *Franciscan Fathers Minors Conventuals of St. Josaphat's Church;* that the property so conveyed was all of the property of the defendant judgment debtor; that each of the defendants is a religious corporation, incorporated not for pecuniary profit, but for the carrying on of the religious and educational work of the Roman Catholic Church, and that the corporation named as grantee had no property or assets out of which it could pay any reasonable price for the land conveyed; that possession of the land was delivered over to the grantee defendant; that the effect of the conveyance was to hinder and delay the plaintiff in the collection of his debt. It is also alleged in the complaint that there was no actual intent to defraud the plaintiff in making the deed, but that the deed is constructively fraudulent.

Each of the defendants answered denying the allegations respecting fraud. The court made the following findings:

"1. That each defendant is a corporation organized under the laws of the state of Wisconsin.

"2. That on the 10th day of July, 1905, the defendant *St. Josaphat's Congregation* borrowed from the plaintiff the sum of $1,200 and gave the plaintiff its promissory note in writing for said sum.

"3. That on the 29th day of July, 1910, judgment was rendered on said note in favor of the plaintiff and against the defendant *St. Josaphat's Congregation* in the sum of $1,422.55.

"4. That during the years 1908, 1909, and 1910 the defendant *St. Josaphat's Congregation* was insolvent.

"5. That during the years 1908, 1909, and 1910 the defendant *St. Josaphat's Congregation* made active and earnest attempts to dispose of its assets for the benefit of its creditors.

"6. That the indebtedness of the defendant *St. Josaphat's Congregation* on or about the 15th day of March, 1910, was

approximately $477,000, $200,000 of which was secured by a mortgage on the real estate of said defendant.

"7. That on the 15th day of March, 1910, the defendant *St. Josaphat's Congregation* sold its property and assets to the defendant *Franciscan Fathers Minors Conventuals of St. Josaphat's Church,* one of the defendants herein, for the sum of $400,000.

"8. That $400,000 was the highest price which said defendant *St. Josaphat's Congregation* was able to obtain after earnest and repeated efforts to sell said property.

"9. That it was for the interest of the creditors of said defendant *St. Josaphat's Congregation* that said sale be made.

"10. That said sum of $400,000 was to be paid as follows: $200,000 by assuming the payment of the mortgage on the real estate transferred, and $200,000 to be paid *pro rata* to the unsecured creditors.

"11. That the plaintiff herein was offered his *pro rata* share and refused the same.

"12. That all of said purchase price has been paid or tendered to the creditors of said *St. Josaphat's Congregation.*

"13. That said conveyance on the 15th day of March, 1910, by the defendant *St. Josaphat's Congregation* to the defendant *Franciscan Fathers Minors Conventuals of St. Josaphat's Church,* was made for the benefit of the creditors of said *St. Josaphat's Congregation.*

"14. That said conveyance of March 15, 1910, was not made with the intent to hinder, delay, or defraud creditors of *St. Josaphat's Congregation.*"

The court concluded that the plaintiff was not entitled to the relief prayed for and that said complaint should be dismissed with costs. Judgment was rendered in favor of the defendants upon these findings dismissing the complaint with costs, from which judgment this appeal was taken.

For the appellant there was a brief by *Rubin & Zabel,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Walmsley.*

For the respondents the cause was submitted on the brief of *H. J. Killilea* and *R. M. Trump,* attorneys, and *Elmore T. Elver,* of counsel.

KERWIN, J. It appears from the findings that the plaintiff failed to make a case against the defendants. It is established that the property was conveyed for a full and valuable consideration and without any fraudulent intent, but on the contrary with the intent and purpose of paying to the creditors *pro rata* the full value of the property and more, because it appears in the case that the property was worth but $400,000, incumbered by a mortgage of $200,000, and that the grantee assumed the payment of the mortgage and also agreed to pay seventy-five per cent. to the unsecured creditors, which aggregated over $200,000, and that all such creditors have been paid seventy-five per cent. of their claims, except plaintiff, and that seventy-five per cent. of his claim has been tendered to him. So that instead of there having been any intent to defraud creditors, it is conclusively established that the conveyance was made for their benefit and without any intent whatever to defraud any creditor or other person.

Sec. 2320, Stats., makes every conveyance in writing of any estate or interest in land made with intent to hinder, delay, or defraud creditors or other persons of their lawful actions, damages, forfeitures, or demands void, and sec. 2323, Stats., makes the question of fraudulent intent a question of fact and not of law, and further provides that a conveyance shall not be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration. The court below found all the facts against the plaintiff, and these findings are well supported by the evidence and cannot be disturbed. *Loeb v. O'Brien,* 93 Wis. 249, 67 N. W. 415; *Kaufer v. Walsh,* 88 Wis. 63, 59 N. W. 460; *Rosenheimer v. Krenn,* 126 Wis. 617, 106 N. W. 20.

Counsel for appellant stated in their complaint and frankly admitted on oral argument here that there was no actual intent to defraud plaintiff and no purpose of that kind entertained by any of the parties concerned in the transaction.

But it is alleged that the deed is constructively fraudulent, therefore as matter of law was made with intent to hinder and delay plaintiff in the enforcement of his debt against the judgment debtor and its property. This contention cannot be sustained. On the established facts it is clear that there was no constructive fraud. Appellant relied under this head upon *Ryan D. Co. v. Hvambsahl,* 89 Wis. 61, 61 N. W. 299, but that case does not reach the situation here, and moreover it was overruled by this court in the late case of *St. Louis C. P. Co. v. Christopher,* 152 Wis. 603, 140 N. W. 351.

It is also claimed by appellant that the conveyance amounted to a voluntary assignment and is void because not in compliance with the statute under the rule of *Winner v. Hoyt,* 66 Wis. 227, 28 N. W. 380, and subsequent cases in this court. Whether the rule of *Winner v. Hoyt* would apply to this case in the absence of legislation we need not consider, because the legislature has changed the rule of that case by ch. 334, Laws of 1897. *Gilbert P. Co. v. Whiting P. Co.* 123 Wis. 472, 102 N. W. 20.

Upon the findings of the court below there is no ground for the contention that any fraud, constructive or otherwise, was established. *Gilbert P. Co. v. Whiting P. Co., supra; Corry v. Shea,* 144 Wis. 135, 128 N. W. 892; *Hyde v. Chapman,* 33 Wis. 391; *St. Louis C. P. Co. v. Christopher, supra,* and cases cited. We think the judgment below is right and must be affirmed.

By the Court.—Judgment affirmed.

RATCLIFFE, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

April 8—April 29, 1913.

Master and servant: Injury to third person: Unauthorized act of agent: Scope of employment: Railroads.

1. When a servant is engaged in the performance of a duty delegated to him by the master, his tortious acts within the scope of his employment, though unlawful, unauthorized, or even forbidden, are binding upon the master.
2. A switch through which, under a contract with defendant, the trains of another railway company entered upon the main line of defendant's road was out of repair, and a section man in defendant's employ had been left in charge of it with directions to wait for an expected train on defendant's road. If a train of the other company came while he was there, he was to open the switch and let that train pass upon defendant's track. He opened the switch to see if the connection rod was broken, and while it was so open a train on defendant's road ran through it and upon the track of the other company, where it struck an engine of the other company and injured the engineer. *Held*, that such act of the section man was within the scope of his employment, and that defendant is liable for the injury.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries alleged to have been caused on November 15, 1910, by the negligence of the defendant. The defendant denied the material allegations of the complaint. The jury returned the following verdict:

"(1) Was the plaintiff injured at the time and place alleged in the complaint? *A.* (by the court). Yes.

"(2) Was such injury caused by the negligence of the employees of the defendant company or any of them? *A.* Yes.

"(3) If you answer the second question 'Yes,' then was such negligence the proximate cause of the plaintiff's injury? *A.* Yes.

"(4) Did Foreman Schmidt spike the switch before leaving it in the morning in question? *A.* No.

"(5) If you answer the fourth question 'Yes,' was Eberling instructed to pull the spikes for the Soo train but not to throw or open the switch? *A.* ——.

"(6) Was Eberling performing an act in the line of his duty to the defendant in opening the switch in question? *A.* No.

"(7) If the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* $1,525."

On motion of the plaintiff the court below changed the answer to the sixth question of the verdict from "No" to "Yes." Judgment was entered for the plaintiff accordingly, from which this appeal was taken.

For the appellant there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Van Alstine.*

For the respondent there was a brief by *Stewart & McDonald,* and oral argument by *Frank Stewart.*

KERWIN, J. The contention of the appellant for reversal is that at the close of the evidence the court below should have directed a verdict for the defendant on the ground that the undisputed evidence showed that when Eberling opened the switch, which act caused the injury, he was not acting within the scope of his employment; and further that the court erred in changing the answer to the sixth question from "No" to "Yes." It is contended by appellant that unless the court below could say as matter of law that Eberling was not acting beyond the scope of his employment when he opened the switch, the finding of the jury on that question should not have been disturbed.

It appears from the evidence that the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, hereafter called the Soo, under a contract with the defendant was using the defendant's track from Rugby Junction to Milwaukee; that the trains of the Soo passed from its track to the track of the

defendant over a connecting track between 400 and 500 feet long; that trains from this connecting track enter upon the main line of defendant's road through a switch, the key to which was in the possession of the employees of the Soo road. The charge of negligence is that the defendant negligently and carelessly ran one of its trains from the main track of defendant in and upon said connecting track upon which the locomotive operated by plaintiff was standing with such force as to injure the plaintiff. The particular negligence complained of is that one Richard Eberling, a section man in the employ of defendant, opened the switch leading from the main line to the connecting track.

The defendant claims that in opening the switch in question Eberling was acting outside of the scope of his employment, therefore the defendant was not responsible for his acts in that regard. The undisputed evidence shows that the switch in question was out of repair and the section foreman of defendant, John Schmidt, with two other section men, Kraus and Eberling, in the discharge of their duties for defendant, went to Rugby Junction to repair it; that it was discovered that the lock of the switch was broken or lost and Eberling was left to watch the switch, the foreman and Kraus going away; that Eberling was instructed by the foreman to remain in charge of the switch until an expected train on defendant's road had arrived, then go to Richfield, procure a switch lock, and lock the switch; that it was the duty of Eberling, in case a Soo train came while he was there, to pull the spikes so the switch could be thrown and let the Soo train onto defendant's track, and, after the Soo train passed, drive the spikes back so as to hold the switch point to the main track; that the switch lock being broken or lost, the point was spiked, and when the point is spiked the switch cannot move; that while Eberling was thus in charge of the switch he thought the connection rod was broken and turned the switch to look at it and found it all right; that when so turned the

main track of defendant's line leads onto the Soo track, and while so opened the defendant's train came and ran onto the Soo track and caused the injury. The foreman told Eberling to stay there and look out for the switch and when train No. 22 arrived to go to Richfield, get a switch lock, and lock the switch. The switch had been spiked to the main track and the spikes were taken out to fix the switch. The evidence is conflicting as to whether the switch had been spiked to the main track after the repairs had been made and before the foreman, Schmidt, and Kraus left. The jury found, as appears from the fourth finding, that it had not.

It further appears from the evidence that the contract between the Soo and the defendant respecting the use of the defendant's track provides in substance that the Soo shall at its own expense maintain the connections of its tracks with the tracks of the defendant at Rugby Junction and require its employees to turn the switches connecting said tracks on defendant's tracks whenever its engines or cars have passed over said switches and save the defendant harmless from all loss which it may suffer on account of accidents caused by the misplacement of switches by the agents or employees of the Soo. This contract, however, is not important as bearing upon the instant case, because the defendant undertook through its agents to repair the switch, and through the negligence of the defendant's agent while so in charge of the switch the injury was caused.

It is argued by counsel for appellant that the evidence shows without dispute that neither the defendant nor Eberling owed any duty to the plaintiff in this case to open or close the switch, and that when Eberling opened the switch he stepped aside from his duty and acted beyond the scope of his employment, hence the master is not liable, on the authority of *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304; *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276; *Steffen v. McNaughton,* 142 Wis. 49, 124 N. W. 1016; and some cases from other jurisdictions. The question has been so often and fully

treated by this court that it is unnecessary to go elsewhere for authority.

It is said by counsel for appellant that in opening the switch Eberling was a mere volunteer and the act one outside of the scope of his employment. It is true the rule is well settled that when an agent acts outside the scope of his employment his acts are not binding upon his principal. But it is not always easy to determine what acts are and what are not within the scope of employment. Whether the acts of a servant are within the scope of his employment is ordinarily a question for the jury. But when the facts are undisputed and no conflicting inferences can be drawn from the evidence, then the question becomes one of law.

In the instant case, from the undisputed evidence it appears that Eberling did not depart from his employment, but merely departed from or neglected a duty within the scope of his employment, and therefore his master was liable for his acts. *Fireman's Fund Ins. Co. v. Schreiber,* 150 Wis. 42, 135 N. W. 507; *Euting v. C. & N. W. R. Co.* 116 Wis. 13, 92 N. W. 358; *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424; *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304; *Fick v. C. & N. W. R. Co.* 68 Wis. 469, 32 N. W. 527. It is well settled that when a servant is engaged in the performance of a duty delegated to him by the master, his tortious acts within the scope of his employment, though unlawful, unauthorized, or even forbidden, are binding upon his master. *Johnston v. C., St. P., M. & O. R. Co., supra,* and cases there cited; *Bergman v. Hendrickson, supra.*

Eberling was an employee of the defendant, acting in the performance of his master's duty, within the scope of his employment, and attempting to perform a duty for the master, and even though he improperly performed that duty, or violated instructions in the performance of it, still the master is liable for his acts.

No other questions require treatment.

By the Court.—The judgment is affirmed.

ZAHN and others, Respondents, vs. ROCKLAND TELEPHONE COMPANY and others, Appellants.

April 8—April 29, 1913.

Appeal: Questions considered: Corporations: Increasing stock: Injunction: Costs: Discretion.

Where, after suit brought to enjoin the issue of increased stock, the corporate articles were amended, apparently in correction of a prior irregular attempt, and the increased stock legally issued, and the trial court thereupon dismissed the complaint but required defendants to pay the costs, this court on appeal declines to pass upon the legality of the prior attempt to amend the articles, the matter of costs being, in any event, within the discretion of the court below.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

For the appellants the cause was submitted on the brief of *Hougen & Brady.*

For the respondents there was a brief by *Kelley & Ledvina,* and oral argument by *Edward Kelley.*

TIMLIN, J. The plaintiffs, shareholders therein, began this action to enjoin the issue of increased stock by the defendant corporation upon the ground that the attempted increase was not legally authorized. Evidence was offered tending to show considerable irregularity, and it also appeared that one month after this suit was commenced, at a special meeting of the stockholders of defendant, the articles of incorporation were amended, apparently in correction of the former irregular attempt, and the increased stock issued in a legal manner. This having been found by the circuit court, the complaint was dismissed, but the defendants required to pay the costs. We cannot, under such circumstances, undertake to decide upon the legal effect of the irregularities in the first proceeding to amend the articles. We are too busy with serious matters.

Whether the first attempt to amend was void, voidable, or valid, the costs in this equity suit were in the discretion of the learned circuit court. Subd. 7, sec. 2918, Stats. We have no disposition to interfere with the exercise of that discretion.

By the Court.—Judgment affirmed.

EVANS, Respondent, vs. CITY OF SHEBOYGAN, Appellant.

April 8—April 29, 1913.

Municipal corporations: Drawbridge: Negligence of bridge tender: Injury to traveler on highway: Liability at common law.

The operation of a draw in a bridge forming part of a highway is, as to travelers over it, a part of the maintenance of the highway, and a city performs therein a governmental, not a municipal, function. There is, therefore, no common-law liability of the city for injuries to a traveler over the bridge caused by negligence of the bridge tender in operating the draw.

APPEAL from an order of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Henry A. Detling, city attorney, for the appellant.

For the respondent the cause was submitted on the brief of *M. C. Mead* and *Edward Voigt.*

BARNES, J. This is an appeal from an order overruling a general demurrer to a complaint in an action brought to recover damages for personal injuries sustained through the negligence of a bridge tender employed by the defendant to operate a drawbridge over a navigable stream. The plaintiff was riding a bicycle over the draw of the bridge when he was injured. No notice of injury such as is required by sec. 1339, Stats., was served, and the only question involved is whether the plaintiff has a common-law right of action.

The question is as close as it is narrow. If as to travelers

over the bridge the bridge tender was performing a municipal function, the rule of *respondeat superior* applies. If he was performing a governmental function it does not apply.

This court is committed to the doctrine that at common law no action could be maintained against a town for damages sustained through a defect in a highway. *Stilling v. Thorp,* 54 Wis. 528, 532, 11 N. W. 906; *McLimans v. Lancaster,* 63 Wis. 596, 600, 23 N. W. 689; *Sowle v. Tomah,* 81 Wis. 349, 351, 51 N. W. 571; *Daniels v. Racine,* 98 Wis. 649, 651, 74 N. W. 553. The reason of the rule is that the duty of opening and maintaining highways is enjoined on towns, cities, and villages by law and for the benefit of the general public, and that in the performance of these duties the municipalities are performing a governmental and not a municipal function. The line of demarcation between these two functions is often shadowy, as will be seen from a review of the cases.

It has been held that a city is not liable for damages for property destroyed by fire resulting from the negligence of the firemen employed, because they were performing a public or governmental duty. *Hayes v. Oshkosh,* 33 Wis. 314; *Britton v. Green Bay & Ft. H. W. W. Co.* 81 Wis. 48, 57, 51 N. W. 84. Nor for the negligence of a fireman in hauling coal for use by the city fire department. *Manske v. Milwaukee,* 123 Wis. 172, 101 N. W. 377. Nor for injury to a person caused by the negligence of a drunken fireman in driving a fire truck. *Higgins v. Superior,* 134 Wis. 264, 114 N. W. 490. Nor for the action of a city treasurer in selling the property of the wrong person to secure payment of delinquent personal property taxes. *Wallace v. Menasha,* 48 Wis. 79, 4 N. W. 101; *Hurley v. Texas,* 20 Wis. 634. Nor for injuries caused by a board of public works in disposing of city garbage. *Kuehn v. Milwaukee,* 92 Wis. 263, 65 N. W. 1030. Nor for the death of a child caused by the negligence of a school board in permitting sewers to become clogged up. *Folk v. Milwaukee,* 108 Wis. 359, 362, 363, 84 N. W. 420.

Nor for injuries resulting to a pedestrian from permitting children to coast on the streets with bob-sleds. *Schultz v. Milwaukee,* 49 Wis. 254, 5 N. W. 342. Nor for issuing a license to permit an exhibition of animals on the streets. *Little v. Madison,* 49 Wis. 605, 6 N. W. 249. Nor for the negligence of a health officer in performing the duties of his office. *Kempster v. Milwaukee,* 103 Wis. 421, 423, 79 N. W. 411. Nor for placing a manhole in a street in a negligent manner. *Ziegler v. West Bend,* 102 Wis. 17, 78 N. W. 164. On the contrary, it has been held that a city in constructing cisterns in which to store water for fire purposes is performing a municipal function and is liable for damages caused by the negligence of its employees. *Mulcairns v. Janesville,* 67 Wis. 24, 29 N. W. 565. And that in the opening of streets and the assessments of damages and benefits resulting therefrom and in collecting the sums so assessed a city is performing a corporate as distinguished from a public duty, and is liable for the tort of an officer in seizing and selling property to pay a void assessment. *Durkee v. Kenosha,* 59 Wis. 123, 17 N. W. 677. And the same rule is held where a city in laying out or building a highway wrongfully invades the property of an abutting owner. *Bunker v. Hudson,* 122 Wis. 43, 54, 99 N. W. 448; *Nicolai v. Verona,* 88 Wis. 551, 60 N. W. 999. Also that a city in furnishing water to private consumers is performing a corporate function and is liable for the negligence of its agents. *Piper v. Madison,* 140 Wis. 311, 314, 122 N. W. 730.

In a case which approaches more nearly in its facts to the one we are considering than any other in this court, it was held that there was a liability at common law for the negligence of a bridge tender which caused the death of a person engaged in navigating the river over which the bridge was constructed. *Weisenberg v. Winneconne,* 56 Wis. 667, 14 N. W. 871.

The court of appeals of the Seventh circuit faced the pre-

cise situation which we have before us, and after a full consideration of the Wisconsin cases held by a divided court that there was a liability at common law, Judges ANDERSON and GROSSCUP reaching this conclusion, while Judge BAKER was of a contrary opinion. *Naumburg v. Milwaukee,* 146 Fed. 641.

It may be here remarked that Wisconsin, in adopting the rule of nonliability at common law for injuries caused by defects in highways, followed the lead of the Massachusetts and some other New England courts, and that these courts have carried the rule to what they deem to be its logical conclusion, by holding that a city is not liable to a traveler over one of its highways for damages resulting from the negligence of a bridge tender. *Butterfield v. Boston,* 148 Mass. 544, 20 N. E. 113; *French v. Boston,* 129 Mass. 592; *Daly v. New Haven,* 69 Conn. 644, 38 Atl. 397. The Michigan court has adopted the same rule and applied it to navigators. *Corning v. Saginaw,* 116 Mich. 74, 74 N. W. 307. There is at least an intimation in *Stephani v. Manitowoc,* 89 Wis. 467, 471, 62 N. W. 176, to the effect that there is no liability in the present case. It is there said:

"If the city had provided suitable barriers and lights, and the bridge tender had omitted to use them, that would be a different case. It would be the case which the defendant argues. It would be like the question decided in *Butterfield v. Boston,* 148 Mass. 544, 20 N. E. 113, which would be a strong authority if applicable."

Judge BAKER in his dissenting opinion in *Naumburg v. Milwaukee, supra,* argues that the case of *Weisenberg v. Winneconne* was correctly decided under the principles of maritime law, which he says are paramount to the common law of a state as expounded by the state courts whenever there is a conflict. His reasoning is to the effect that our navigable rivers are highways of the United States over which Congress has assumed jurisdiction to the extent of prescribing the conditions under which they may be obstructed by draw-

bridges (Act July 5, 1884, 23 U. S. Stats. at Large, 148, ch. 229, sec. 8); that the right of the navigator is paramount to that of the land traveler; that the right to maintain drawbridges is given on condition that they be properly maintained and operated so as not to interfere with navigation; and that admiralty law does not recognize the right of any municipality to secure immunity from damages resulting from the negligent operation of a drawbridge by invoking any rule of local law. The reasoning advanced is sustained by the case of *Workman v. New York,* 179 U. S. 552, 21 Sup. Ct. 212, and also by *Greenwood v. Westport,* 60 Fed. 560. It should be said, however, that neither the courts of Massachusetts nor Michigan recognize any such rule of law. We think there is reason for saying that as to a person navigating a river a municipality is performing a corporate duty, or, if not, that it cannot escape liability for negligence of its employees by asserting that it is performing a governmental duty. We are presently dealing with the rights of a traveler over the bridge and not of one over the waterway. It seems quite clear that the operation of a drawbridge is a part of the maintenance of a highway as to travelers over it. A bridge as to land travelers is part of a highway, and the draw therein, if there is one, is part of the bridge. Neither bridges nor draws are constructed to aid navigation. In fact they obstruct it. They are built and operated in aid of land travel. It is difficult to see wherein a city, as to land travelers, is acting in a different capacity in the matter of maintaining barriers along or across a bridge or in renewing planks therein than it is when it opens a draw to permit a vessel to pass through. If there is any difference it is too refined for practical application. Operation of the draw in such a case is part and parcel of the work of maintaining the highway by land. The duty of doing the work is enjoined upon the city by law. The service is performed for the general public. The city in its corporate capacity receives no more benefit from it than it does from building the bridge itself or from constructing a street

in the city. These are the tests which generally determine whether a function is municipal or governmental. We are unable to escape the conclusion that as to the plaintiff the city was performing a governmental duty. For negligence in this regard there is no common-law liability.

By the Court.—The order appealed from is reversed, and the cause is remanded with directions to sustain the demurrer to the complaint.

MONTEVILLA, Appellant, vs. NORTHERN FURNITURE COMPANY, Respondent.

April 8—April 29, 1913.

Master and servant: Injury from wood-working machine: Knives securely guarded: Duty of master to warn servant of dangers.

1. The knives in a machine used to trim and plane the edges of boards are *held* to have been securely guarded, under sec. 1636*j*, Stats., by a metal hood between the knives and the operator, which automatically dropped down upon the boards and adjusted itself to them in such a manner as to leave only space enough for the knives to engage and trim the edges of the boards as they passed through the machine, and which, when no boards were inserted, came three eighths of an inch below the cutting edges of the knives.
2. A master's duty to warn a servant is fulfilled when the servant is warned as to all risks or hazards that are incident to the employment when carried on in the manner in which the servant is instructed to do the work or in which an ordinarily prudent person may reasonably anticipate it may be done by the servant.
3. No duty devolves upon the master to warn a servant of dangers which are as obvious to the servant as to the master.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Plaintiff brought this action to recover damages for a personal injury. He is a Lithuanian by birth and a laborer by

occupation. He had very little knowledge of English, but could read and write in his native language. The defendant owned and operated a manufacturing plant in the city of Sheboygan, which was equipped with power-driven machinery, and employed a large number of persons. May 14, 1912, plaintiff applied for and was given employment by defendant at its plant and was directed to remove certain trimmed boards turned out from one of its machines. The following day he was set to work at a machine and was told, as he testified, to feed it. The wood-working machine he was given to operate is known as a double-joiner, was driven by belt power, and was used to trim and plane the upper and lower edges of boards that were passed through it. The whole machine was about fifteen feet long. It consisted of a steel table about four feet above the floor, in the center of which, above and below, were shafts or heads unto which were fastened knives that trimmed at the same time the bottom and top edges of boards that went through the machine. The method by which the work was performed was by placing a number of boards, clamped together in an upright position, on a sliding table or carriage, about eighteen inches wide, which, when the operator pulled a lever, carried the boards forward under the planing knives to be planed, and then the boards were removed by an employee called the off-bearer at the rear of the machine. After the boards were removed the operator, also by means of a lever, reversed and returned the empty carriage for reloading. The length of the cutting edges of the knives in the upper head or shaft was eight inches. Between the operator and the upper shaft, and hung on a hinge immediately in front thereof, was a hood, or solid piece of iron or steel, about nine inches wide and one and a half inches thick, which concealed in back of it the upper knives in the head or shaft, and moved upward about a half an inch when it was raised by the boards on the sliding carriage as they were passing through the knives to be planed. This hood was three eighths

of an inch lower than the lowest point of the blades of the upper knives, and every part of the knives, except the cutting edges at the bottom where the upper parts of the boards entered to be edged, was completely covered.

On the day of the injury the plaintiff had placed about eight boards on the carriage and by means of the lever conveyed the same into the machine to be planed. After the boards were planed, but before all but three of them were removed at the rear of the machine, he started back the carriage, which, with the remaining boards, became stuck in the machine and failed to return. The short ends of the boards were about eleven or twelve inches from the knives, on the forward side of the machine, pointing toward the operator, and the long ends remained on the rear end of the machine, where the off-bearer stood. Failing to move the carriage with the boards on it either way by means of the lever, plaintiff placed his hands on the ends of the boards toward him and shoved them forward, and in doing so his right hand slid under the knives and was injured.

The grounds of negligence charged in the complaint were: (a) failure to furnish the plaintiff with a reasonably safe place to work; (b) failure to furnish plaintiff with a reasonably safe appliance; (c) failure to warn and instruct the plaintiff as to the dangers incident to the operation of the machine; (d) failure to have the part of the machine which caused the injury securely guarded or fenced; (e) failure to furnish the plaintiff with competent fellow-servants; (f) failure to have some competent person in charge of the work in said plant whose duty it was to see that employees had reasonably safe places to work and reasonably safe appliances to work with; and (g) failure to promulgate rules and regulations for the conduct of the business.

The answer denied, generally, these several allegations of negligence set forth in the complaint, and also pleaded in defense the contributory negligence of the plaintiff. At the

close of the evidence the trial court, on motion of defendant, granted an order of nonsuit on the ground of contributory negligence, and from a judgment entered thereon the plaintiff appealed.

For the appellant there was a brief by *Rubin & Zabel,* attorneys, and *W. B. Rubin* and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

For the respondent there was a brief by *Burr J. Scott,* attorney, and *Lawrence A. Olwell,* of counsel, and oral argument by *Mr. Scott.*

VINJE, J. The trial court held that plaintiff was guilty of contributory negligence as a matter of law in attempting to push the boards back under the knives in the manner he did. The case of *Gardner v. Paine L. Co.* 123 Wis. 338, 101 N. W. 700, strongly supports such ruling. But since the case fails to establish any negligence on the part of the defendant, it is not necessary to decide the question of plaintiff's contributory negligence. Conceding that the knives should be guarded as provided in sec. 1636*j*, Stats., the undisputed testimony is that they were securely guarded by a metal hood that automatically dropped down upon the boards and adjusted itself to their different heights in such a manner that it left only space enough for the knives to engage and trim the edges of the boards as they went through the machine, and when no boards were inserted it came about three eighths of an inch below the cutting edges of the knives. It is obvious that a sufficient opening to admit the boards and to allow the knives to engage them enough to be trimmed must be left unguarded or else the machine became useless. It was through this space that necessarily had to be left unguarded that plaintiff's hand came in contact with the knives. Every other part of the machine was securely guarded. So there was no failure to guard under sec. 1636*j*.

But it is claimed that defendant should have warned plaint-

iff of the danger of getting his hand into the machine. There are two answers to this contention. In the first place, in the ordinary and usual operation of the machine, there was no occasion whatever for plaintiff putting his hand near the knives. The boards were clamped into the movable carriage, a lever was then turned, and they were carried through under the knives without any guidance or assistance on the part of the plaintiff or operator of the machine. When the boards were trimmed they were taken away by the employee behind the machine, the lever was then reversed, and the empty carriage returned ready for the insertion of more boards and a repetition of the operation. There was no need of the operator placing his hands on the boards at all after they were clamped into the carriage. And there is no evidence to show that such a clogging had ever occurred before. It was occasioned by plaintiff reversing the lever before all the boards were taken away. He says if he had looked he could have seen that they had not been removed. The master, therefore, could not anticipate that such clogging might result and that plaintiff might be tempted to put his hands on the boards to push them through, because such a situation had never before arisen. The master is bound to warn only against dangers which an ordinarily prudent man may reasonably anticipate may occur, in the ordinary course of the servant's employment, and then only when the servant may reasonably be presumed to be ignorant thereof. He is not bound to warn against the unexpected, nor against dangers which may attend an unusual or freakish manner of doing the work. No one can anticipate all the contingencies that may arise in an unusual performance of a duty. Where it is a master's duty to warn a servant, such duty is fulfilled when the servant is warned as to all risks or hazards that are incident to the employment carried on in the manner in which the servant is instructed to do the work, or in which an ordinarily prudent

person may reasonably anticipate it may be done by the servant. There is no duty upon the master to warn against every possible danger to which the servant may be subjected in the course of his employment. *Dahlke v. Ill. S. Co.* 100 Wis. 431, 76 N. W. 362; *Powalske v. Cream City B. Co.* 110 Wis. 461, 86 N. W. 153; *Kroger v. Cumberland F. P. Co.* 145 Wis. 433, 130 N. W. 513. Here the danger sprang out of a particular fact, or combination of circumstances, which the master could not reasonably anticipate would occur, and hence no duty to warn against it arose. *Girard v. Griswold,* 177 Mass. 57, 58 N. E. 179; *Powers v. Wyman & G. Co.* 199 Mass. 591, 85 N. E. 845; *Sommers v. Standard M. Co.* 146 Mich. 111, 109 N. W. 30; *Ahern v. Amoskeag Mfg. Co.* 75 N. H. 99, 71 Atl. 213, 21 L. R. A. N. S. 89 and note.

In the second place, there was no duty to warn because the danger of injury from getting one's hand into the machine was as obvious to the plaintiff as to the defendant. It is true plaintiff testified that he did not know there were knives under the hood; that he thought there were some kind of rollers that took the shavings off from the boards as they passed through. But it is immaterial whether he thought rollers or knives took off the shavings. It was obvious from the work done by the machine that serious injury to his hand would follow from its coming in contact with the part thereof that trimmed the boards. Plaintiff was twenty-nine years old, had been in this country eleven years, and had worked at various employments, including one year in a glove factory. No grown person, whatever his schooling or lack of schooling, could fail to appreciate that a machine that would trim the edges of boards as those were trimmed would seriously injure one's fingers if they got into it. Machines speak a universal language. And the operating parts of this one spelled danger to fingers coming in contact therewith just as plainly in the Lithuanian tongue as they did in English. It was equally

obvious to him as it was to the defendant that his hands might slip from the ends of the boards if he pushed against them. For these reasons it must be held that no duty devolved upon the defendant to warn the plaintiff.

There was no evidence to sustain any other charges of negligence.

By the Court.—Judgment affirmed.

NICKELS, Administratrix, Respondent, vs. MANITOWOC SHIPBUILDING & DRY DOCK COMPANY, Appellant.

April 8—April 29, 1913.

Master and servant: Injury from unguarded shafting: Evidence: Custom in other shops: Ordinary method of doing work: Expected method: Broken pulley: Cross-examination of adverse witness: Special verdict: Appeal: Harmless errors.

1. Where employees are expected and required at times to ascend upon a staging and work in close proximity to a line shaft while in motion, such shaft, though elevated nearly fourteen feet above the floor, is within the provisions of sec. 1636*j*, Stats., requiring the guarding of all shafting so located as to be dangerous to employees in the discharge of their duties.
2. In an action for the death of an employee who was caught on such a line shaft, evidence that line shafting of the same general nature in other shops was not usually guarded, was neither controlling nor of much weight, where it appeared that in such shops employees were not expected, in the course of their duties, to approach the shafting while in motion.
3. Error in refusing to permit cross-examination of an employee of defendant, called as an adverse witness under sec. 4068, Stats., cannot be regarded as prejudicial where such witness was called almost at the close of plaintiff's case and defendant could have put him upon the stand as a witness for the defense within a few minutes after his examination as an adverse witness ceased, but did not choose to do so.
4. In an action for the death of an employee, caused by being caught on a line shaft while engaged, according to plaintiff's theory, in putting a belt onto a pulley on such shaft, there being no wit-

ness who saw the accident, it was competent to prove by other shop employees the ordinary method of putting a belt on under the circumstances, that not being a matter of common knowledge, in order to show that the deceased would thereby be brought in close proximity to the shaft where his clothing would be likely to be caught.

5. After defendant's foreman had testified that the belt which the deceased was putting on at the time of his death was always put on while the shaft was in motion, there was no error in permitting him to testify that he expected the deceased would do it in that way when he sent him to the place.

6. Where a break on the edge of a pulley was alleged in the complaint to be one of the causes of the death of plaintiff's intestate, but no evidence was offered on the trial tending to show that the break had any connection with the accident, which occurred in an attempt by deceased to put a belt onto such pulley, the mere admission of the pulley in evidence, even if error, was not prejudicial.

7. Where the questions of a special verdict fully cover the issues and are unobjectionable in form, the refusal of the court to submit other questions is not error.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The plaintiff sues for the death of her husband, who was killed while in the employ of the defendant, January 12, 1912, by being caught and whirled around one of the main line shafts in the defendant's shop at Manitowoc. The negligence charged is that the shaft had no guard. The deceased was a carpenter, thirty years of age, earning about $70 a month. The accident happened in the afternoon in the punch room of the factory. This room is about fifteen feet five inches in height. The line shaft on which the intestate was killed runs through the room from east to west, thirteen feet ten inches above the floor, and about two feet from the north side of the room. Upon this shaft is a wooden pulley twelve inches in diameter and ten inches wide, on which a four-inch belt runs south and slightly upward to a short countershaft, five feet three inches distant. From this countershaft a smaller belt runs eastward and slightly downward to a pulley

which operates a countersink machine. On the countershaft there is a loose pulley at the west end, and a tight pulley next to it eastward. When the countersink machine is not in use the belt from the main shaft runs on the loose pulley, but when it is desired to operate the countersink machine the belt is shifted to the tight pulley by means of a belt shifter. The belt shifter was a square wooden bar, two by two inches in size, running in wooden guides, and located horizontally about one foot and three inches north of the center of the countershaft, and operated from the floor below by a lever or handle projecting downward from the east end thereof. The belt shifter was four feet distant from the main shaft and parallel to it, but a few inches higher from the floor. There was a sort of a staging ten feet above the floor, consisting of two long, heavy planks, running substantially east and west, and a shorter plank crossing them. This staging was between the countershaft and the main shaft, and, while not apparently of permanent construction, had remained there for some years, and was used by employees when necessary to repair or renew the belts or pulleys at this place. There was no guard on either the main shaft or the countershaft.

On the day of the accident Nickels, the deceased, was sent by his foreman, Hendries, to place a new tight pulley on the countershaft in place of the old one. The main shaft was in motion as usual. Nickels was told to "put the pulley on the shaft so as to have it ready in case they wanted to use the machine, everything completed." The belt was then lying on the loose pulley of the countershaft and on the main shaft west of the pulley. Nickels went upon the staging and attempted to do the work required, but found that he needed additional materials, and went down and reported to Hendries, who gave him a piece of rubber belting for use in fastening the pulley. Nickels then returned to the work and succeeded in fastening the pulley to the countershaft. No one saw the accident, but it appears that in some way Nick-

els's jumper was caught and wound around the main shaft, and he was horribly mangled before the machinery could be stopped. The belt was found east of the pulley on the main shaft, and the nearest point of Nickels's body was eighteen inches east of the same pulley.

The jury returned the following special verdict:

"(1) Was the unguarded shaft by which plaintiff's intestate, Herman Nickels, deceased, was caught and killed, so located as to be dangerous to him in discharging the duty of his employment which he was performing at the time when he was killed? *A.* Yes.

"(2) If your answer to the first question be 'Yes,' then answer this: In leaving said shaft without a guard and without a fence, did defendant fail to exercise ordinary care? *A.* Yes.

"(3) If the first question be answered 'Yes,' then answer this: Was defendant's failure to guard or fence said shaft the proximate cause of the death of Herman Nickels? *A.* Yes.

"(4) Was there on the part of Herman Nickels any want of ordinary care which contributed to cause his death? *A.* No.

"(5) If the court shall be of the opinion that plaintiff is entitled to judgment in her favor, what sum will fairly and reasonably compensate *Mary Nickels,* the widow of said deceased, for the pecuniary injury to her resulting from his death? *A.* Five thousand eight hundred sixteen ($5,816) dollars."

From judgment for the plaintiff on this verdict the defendant appeals.

For the appellant there was a brief by *Nash & Nash* and *Doe & Ballhorn,* and oral argument by *J. B. Doe.* They contended, *inter alia,* that there was in the case neither an element of reasonable anticipation of injury on the part of the employer nor sufficient evidence to remove the cause of the accident from the realm of conjecture, citing *Kruck v. Wilbur L. Co.* 148 Wis. 76, 133 N. W. 1117; *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992; *Willette v. Rhine-*

lander P. Co. 145 Wis. 537, 130 N. W. 853; *Bandekow v. C., B. & Q. R. Co.* 136 Wis. 341, 117 N. W. 812; *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350, 119 N. W. 289; *Schmitt v. Seefeld,* 139 Wis. 459, 121 N. W. 136; *Glenesky v. Kimberly & C. Co.* 140 Wis. 52, 121 N. W. 893; *Schiefelbein v. Badger P. Co.* 101 Wis. 402, 77 N. W. 742; *Hamann v. Milwaukee B. Co.* 127 Wis. 550, 106 N. W. 1081; *Hart v. Neillsville,* 141 Wis. 3, 123 N. W. 125; *Houg v. Girard L. Co.* 144 Wis. 337, 129 N. W. 633; *Schell v. C. & N. W. R. Co.* 134 Wis. 142, 113 N. W. 657; *Schultz v. C., M. & St. P. R. Co.* 116 Wis. 31, 92 N. W. 377; *Koutsky v. Forster-Whitman L. Co.* 146 Wis. 425, 131 N. W. 1001; *Musbach v. Wis. C. Co.* 108 Wis. 57, 84 N. W. 36; *Law v. American B. Co.* 147 Wis. 224, 132 N. W. 593; *Sorenson v. Menasha P. & P. Co.* 56 Wis. 338, 14 N. W. 446; *Morrison v. Phillips & C. C. Co.* 44 Wis. 405; *Beyersdorf v. Cream City S. & D. Co.* 109 Wis. 456, 84 N. W. 860; *Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833.

For the respondent there were briefs by *Hougen & Brady,* attorneys, and *Martin, Martin & Martin,* of counsel, and oral argument by *P. H. Martin.* They cited, among other authorities, *Muenchow v. Theo. Zschetzsche & Son Co.* 113 Wis. 8, 88 N. W. 909; *Graves v. Rib Lake L. Co.* 151 Wis. 99, 138 N. W. 86; *Koch v. Wis. P. C. Co.* 152 Wis. 488, 140 N. W. 37; *Miller v. Kimberly & C. Co.* 137 Wis. 138, 118 N. W. 536; *Monahan v. Fairbanks-Morse Mfg. Co.* 147 Wis. 104, 132 N. W. 983; *Monaghan v. Northwestern F. Co.* 140 Wis. 457, 122 N. W. 1066; *McGinnis v. Northern P. Mills,* 147 Wis. 185, 132 N. W. 897, 133 N. W. 22; *Chopin v. Combined Locks P. Co.* 134 Wis. 35, 114 N. W. 95.

WINSLOW, C. J. Numerous assignments of error are made, many of which will not be discussed in this opinion, but it is not to be understood therefrom that all have not received attention.

The general claim is made that the evidence was overwhelming that it was not usual or customary to guard main shafting situated as the shafting was in this case, and hence that sec. 1636*j* of the Statutes does not cover the case under the rule approved in *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992. There was undoubtedly much testimony tending to show that line shafting of the same general nature in other shops is not usually guarded, but the difficulty is that much of that testimony related to line shafting which employees were not expected to approach in the course of their duties while in motion. In the present case the evidence quite satisfactorily showed that the employees of the defendant were expected and required to ascend upon the staging and work at times in close proximity to this line shaft while it was in motion. The statute requires the guarding of all shafting so located as to be dangerous to employees in the discharge of their duty. In shops where no duty called an employee to the vicinity of a moving shaft, it may well be that the statute imposes no duty to guard it, but the fact that such shafts are not generally guarded would cast no light on the question of the duty to guard a shaft near which employees are required to work while it is in motion. There was plenary evidence that the shaft in question here was such a shaft, hence the evidence of custom above referred to had little weight and certainly was not controlling.

Some detail errors assigned will be given brief notice.

An employee of the defendant, named Nuhs, was called by the plaintiff as an adverse witness, and upon objection by the plaintiff the defendant's counsel was not allowed to cross-examine him. This was error under the ruling in *Guse v. Power & M. M. Co.* 151 Wis. 400, 139 N. W. 195. However, it does not appear that the error was in any respect prejudicial. The witness was called almost at the close of the plaintiff's case, and the defendant could easily have put him on the stand as a witness for the defense within a few moments after

his examination as an adverse witness ceased, but did not choose to do so. We see no reason to suppose that the refusal to allow cross-examination prejudiced the defendant's case in any way.

No one saw the accident, and certain shop employees who were called as witnesses for the plaintiff were allowed to state how they would go to work to put the belt on the pulley on the main shaft, and how it was usually done, the plaintiff's theory being that the deceased had concluded his work of putting the new tight pulley on the countershaft, and had crossed over on the staging to the immediate proximity of the main shaft, and was attempting to put the belt onto the pulley on the main shaft when his jumper was caught by the shaft itself. These questions were objected to, and error is assigned on the overruling of the objections, but we see no good ground for complaint. The question for the jury was whether the plaintiff was caught while endeavoring to perform his duty. If a witness had seen him trying to put the belt on when his clothing was caught, he could have testified to the fact. No one having seen him, it was certainly competent to show that in the ordinary course of an attempt to put the belt on he would be brought in close proximity to the shaft, where his clothing would be likely to be caught. As the ordinary method of putting a belt on under such circumstances is not matter of common knowledge, no reason is perceived why those who had what may be called expert knowledge on the subject could not testify to it. The foreman, Hendries, after testifying that the belt was always put on at this place when the main shaft was in motion, was allowed to answer against objection that he expected Nickels would do it that way when he sent him up there. This ruling is assigned as error, but we see none. If the belt was always put on that way, and the foreman gave no instructions to do the task in any different manner on this occasion, it would seem that not only the foreman but Nickels himself would necessarily expect that

it would be done in the usual and customary way. In any event, no prejudice could result from the ruling.

The pulley on the main shaft had a break on the edge, and this break was alleged in the complaint to be one of the causes of the accident. On the trial, however, there was no evidence tending to show that the break had any connection with the accident. The plaintiff, however, was allowed to introduce the pulley in evidence, and this ruling is alleged to be error. It does not appear that any comment was made on the condition of the pulley, or any argument based thereon. Doubtless the court would have instructed the jury that the break was not to be in any way considered had he been requested to do so, but he was not. It is clear that this was a part of the machinery about which the deceased was at work when the accident happened. No intelligent juryman could have supposed under the state of the evidence that the break in question had anything to do with the death of the deceased, and we are unable to see how the introduction of the pulley in evidence could have been prejudicial in any event, even if it were conceded to have been improperly admitted.

Fault is found with the questions submitted to the jury, as well as with the rulings of the court refusing to submit certain other questions proposed by the defendant, but we are well satisfied that the questions actually submitted fully cover the issues and are not objectionable in form. Complaint is also made of the charge, but it seems on examination to have very carefully guarded the defendant's rights and to include all the substantial propositions necessary to be placed before the jury to enable them to properly understand the questions and the law applicable to them.

On the whole, the case seems to have been tried with conspicuous fairness and care. There was ample ground for the inference drawn by the jury that the deceased met his death while attempting to put the belt on the main shaft pulley, after completing his work on the countershaft, and thus carry

out his instructions to have everything in readiness for the operation of the countersink machine.

Few cases depending on inferences from circumstances are more satisfactorily proven than the present. We discover no prejudicial error in the record.

By the Court.—Judgment affirmed.

KNAUF & TESCH COMPANY, Appellant, vs. ELKHART LAKE SAND & GRAVEL COMPANY and others, Respondents.

April 9—April 29, 1913.

Estoppel: Passing of title to land: Fraud by agent: Pointing out boundaries which include his own land: Statute of frauds: Equity: Retaining jurisdiction: Remedy at law.

1. The familiar principle of estoppel *in pais* whereby the title to land of one who has fraudulently induced a person to buy it as the property of another is taken from him and vested in such purchaser, if otherwise, without want of due care on his part, the latter would be pecuniarily injured, applies to the case of an agent of a corporation who, while negotiating the sale of land of the corporation, points out boundaries which include land of his own.
2. Estoppel by covenant and estoppel *in pais* are clearly distinguishable, but each, operating in its appropriate sphere, is as effectual as the other to pass the title to real estate.
3. The doctrine of the transfer of the title to land by estoppel *in pais* does not violate the statute of frauds, which is the weapon of the written law to prevent fraud, not an instrumentality to enable the evil-disposed to perpetrate fraud.
4. A court of equity has very broad power in respect to disposing of the entire controversy appearing from the pleadings and evidence, whether legal or equitable relief, or both, be required; and where an action in equity is brought in good faith, it should not be dismissed upon its appearing that there is no sound basis for other than legal relief, merely because the facts were known to the plaintiff in the beginning, especially where no objection was made by answer or demurrer to the court's dealing with the matter.

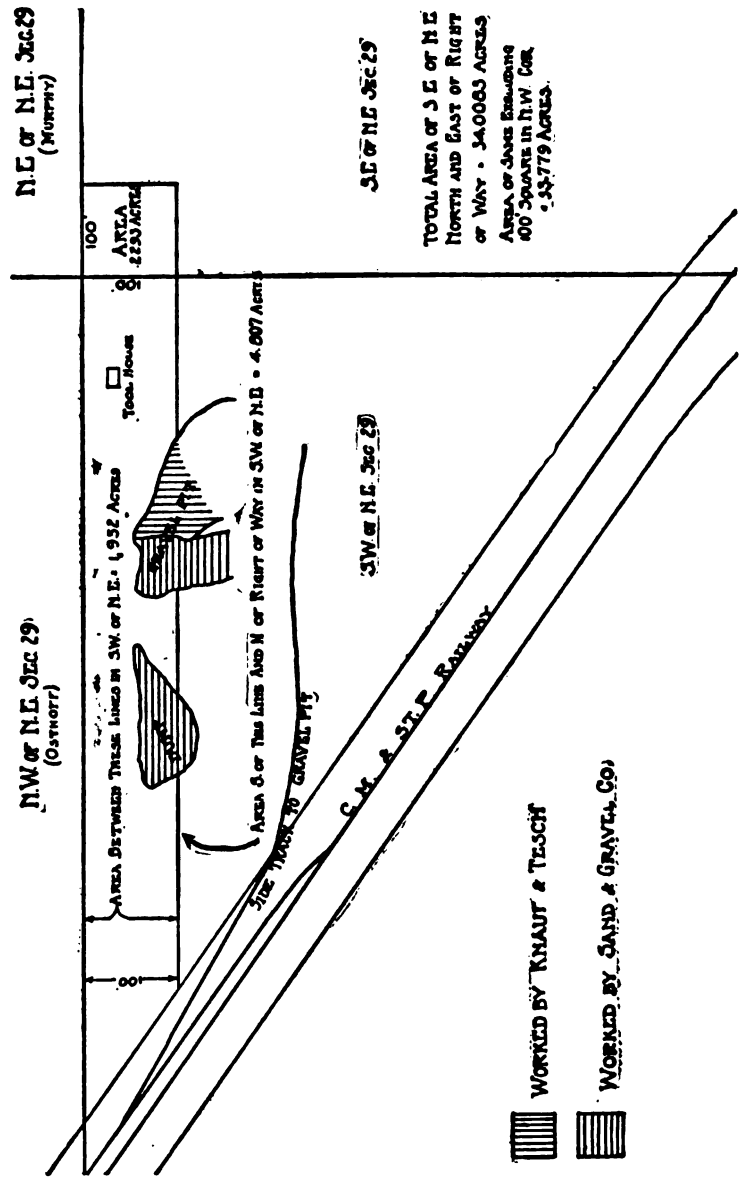
Knauf & Tesch Co. v. Elkhart Lake S. & G. Co. 153 Wis. 306.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action for equitable relief, establishing title to certain real estate in plaintiff and remedying the wrong complained of.

The issues raised and the nature of the evidence are shown by the following abridgment of the findings:

April 17, 1911, negotiations were begun between *Garvens,*—secretary, treasurer, and principal stockholder of the defendant *Gravel Company,*—and the president and vice-president of the plaintiff, as to a sale by such company of its real estate and property to plaintiff; such property being then used by the former for the excavation and sale of gravel, which business, the latter, to the *Gravel Company's* knowledge, intended in case of purchase to continue. The *Gravel Company's* land consisted of about thirty-eight acres describable as the south half of the northeast quarter of section 29, town 16, range 21 east, Sheboygan county, Wisconsin, northerly of the northerly boundary of the right of way of the Chicago, Milwaukee & St. Paul Railway Company, except a strip 100 feet wide off from the north side of the southwest quarter of said northeast quarter and extending 100 feet into the southeast quarter of the northeast quarter. The excepted part was used in common with the rest by the *Gravel Company,* but it belonged to *Garvens,* which, however, was unknown to plaintiff. For aught it knew, all belonged to such company. Such part is the land in controversy. It was bounded on the north substantially by fence. The forty on the north of the east part of the *Gravel Company's* land was owned by Murphy, an officer of the company, but plaintiff supposed *Garvens* had some interest therein though he said nothing about his having any interest in any land south of the fence of any which plaintiff's agents examined as *Gravel Company's* land, which included all but the Murphy forty. *Garvens* solicited such agents to buy all the holdings. The diagram on page 308 shows the situation as it existed in fact.


N.E. OF N.E. SEC 29
(MURPHY)
N.W. OF N.E. SEC 29
(OSTHOFF)
S.E. OF N.E. SEC 29
S.W. OF N.E. SEC 29
100'
AREA
2.233 ACRES
TESCH HOUSE
AREA BETWEEN THESE LINES IN S.W. OF N.E. = 1.932 ACRES
AREA S. OF THIS LINE AND N. OF RIGHT OF WAY IN S.W. OF N.E. = 4.007 ACRES
SIDE TRACK TO GRAVEL PIT
C. M. & St. P. RAILWAY
TOTAL AREA OF S.E. OF N.E. NORTH AND EAST OF RIGHT OF WAY = 34.0083 ACRES
AREA OF SAME BEARING 400' SQUARE IN N.W. COR. = 35.779 ACRES
WORKED BY KNAUF & TESCH
WORKED BY SAND & GRAVEL CO.

Plaintiff's agents, during the negotiations with *Garvens,* representing the *Gravel Company,* examined what was understood to be the latter's holdings, which included the 100-foot strip. Into such strip the *Gravel Company's* operations had extended in excavating gravel for sale. While the parties were exploring the premises *Garvens* pointed to the fence as the north boundary, saying nothing as to his having any individual interest south of it. Relying thereon, April 18th, thereafter, plaintiff contracted in writing to acquire the *Gravel Company's* property for $4,500, the business being done in behalf of the latter by *Garvens* and Murphy. In the written contract the property dealt with was thus described:

"The lands known as the *Elkhart Lake Sand & Gravel Company's* sand and gravel pit, consisting of about thirty-eight acres of land situated in the county of Sheboygan, state of Wisconsin, together with the personal property, tools, and equipment needed to operate the same as it has been operated by us."

April 21st, thereafter, for his company, *Garvens* delivered to Knauf, for plaintiff, an abstract and conveyance with other papers in execution of such contract, representing that such conveyance included the lands agreed upon. The papers were received for examination with the understanding that another paper, showing corporate authority to sell, would be furnished and that plaintiff should decide upon the sufficiency of the deed later. That was consented to by *Garvens,* but for accommodation of his company plaintiff then paid the purchase money. The lands were described in the conveyance thus:

"The following described real estate situated in Sheboygan county, state of Wisconsin, to wit: beginning one hundred (100) feet due east of the northwest corner of the southeast quarter (¼) of the northeast quarter (¼) of section No. twenty-nine (29) in township No. sixteen (16) north, of range No. twenty-one (21) east, and running thence east twelve hundred and eighty-nine hundredths (1200.89) feet to the northeast corner of said southeast quarter (¼), thence

due south to the southeast corner of said southeast quarter (¼), thence due west six hundred seventy-six (676) feet to the east line of the right of way of the Chicago, Milwaukee & St. Paul Railway, thence northwesterly along said right of way to the west line of said southeast quarter (¼), thence due north five hundred forty-three (543) feet to a point one hundred feet south of the northwest corner of the said southeast quarter (¼), thence due east one hundred (100) feet, thence due north one hundred (100) feet, to the place of beginning, containing 33.77 acres of land.

"Also that part of the southwest quarter (¼) of the northeast quarter (¼) of said section lying northeast of the right of way of the Chicago, Milwaukee & St. Paul Railway, excepting the north one hundred (100) feet, and described as follows:

"Beginning one hundred (100) feet due south of the northeast corner of said southwest quarter (¼) and running thence west parallel with the north line of said southwest quarter (¼) seven hundred eighty-two (782) feet, more or less, to the east line of the right of way of the Chicago, Milwaukee & St. Paul Railway, thence southeasterly along said right of way to the east line of said southwest quarter (¼), thence due north five hundred forty-three (543) feet to the place of beginning, and containing 4.87 acres of land."

A careful examination of the conveyance and abstract would have disclosed that the premises in controversy were not included in the deed or according to the representations made leading up to the contract, nor to such contract, as plaintiff understood it in the light of such representations and that the *Gravel Company* never owned the strip. Such careful examination was omitted by consent of *Garvens,* because Mr. Knauf was required, for the time being, to give attention to sick relatives. Some few days thereafter, and before plaintiff had made the full examination of the papers contemplated, Murphy endeavored, as *Garvens* had before ineffectually, to have plaintiff purchase his forty; threatening that, if it did not, there would be competition in the gravel business; the 100-foot strip in controversy, which he then

asserted belonged to *Garvens,* being used in reaching shipping facilities. That was the first intimation to plaintiff that the deed did not describe the 100-foot strip. Therefore, pursuant to the understanding had when the contract was made, plaintiff took possession of what it supposed was the *Gravel Company's* property, described in the land contract, and has ever since remained in such possession, carrying on the gravel business. Seasonably after the intimation aforesaid, plaintiff discovered the facts and demanded conveyance of the disputed premises, which was refused. Under the circumstances plaintiff was not negligent in failing to discover the true state of things earlier than it did. May 11th, after the transactions aforesaid, *Garvens* notified plaintiff in writing to vacate the strip. Murphy then negotiated with defendant *Feldmann* to sell it with his forty, resulting in the latter arranging to take such property and transfer the strip to defendant *Laun* for $700; both *Feldmann* and *Laun* having knowledge of plaintiff's occupancy and claim to have purchased the strip supposing it was a part of the *Gravel Company's* property, described in the contract. *Feldmann* and *Laun* caused the records to be examined, resulting in confirmation of Murphy's claim that the title to the strip was in *Garvens* and never had been in the *Gravel Company.* Relying thereon and the representations by Murphy that *Garvens* owned the strip, *Feldmann* purchased it with the Murphy forty, taking the paper title thereto. May 16th, thereafter, he conveyed the strip to *Laun.* Neither of the parties made any inquiry of plaintiff's officers in respect to their claim to the property. A few days later *Laun* and others formed the defendant *Concrete Company* which, June 22d thereafter, acquired paper title to the disputed strip. All the deeds vesting the record title in the *Concrete Company* were duly recorded. *Feldmann* and the parties who formed the *Concrete Company* did not combine to defraud plaintiff. They acted in the belief that Murphy's claim as to the plaintiff not having any right to the disputed

premises was true and upon the record title. *Garvens,* in the transactions with plaintiff, acted solely for the *Gravel Company,* making no representations in his own behalf.

On such facts the court concluded that plaintiff was not entitled to hold the *Garvens* land because he acted solely for his company, and that the cause could not properly be retained for legal relief because plaintiff knew the facts when the action was commenced.

Judgment was ordered for defendant on the grounds stated in the opinion referred to. There were no conclusions of law embodied in the paper filed in execution of the statutory requirements for findings of fact and conclusions of law to be filed by the trial judge. In place thereof, and denominated "conclusions of law," there was an order dissolving a temporary injunction granted at the commencement of the action, and an order for judgment dismissing the action on the merits, each party to pay its or his own costs.

Exceptions were filed requisite to save for review the questions discussed in the opinion.

For the appellant there was a brief by *J. E. McMullen,* attorney, and *Simon Gillen,* of counsel, and a reply brief and oral argument by *Mr. McMullen.* They argued that the defendant *Garvens* acted in his individual capacity as owner of the land in question, and not merely as agent of the corporation. *Hubbard v. Oliver* (Mich.) 139 N. W. 77; *Kipp v. Laun,* 146 Wis. 591, 131 N. W. 418. Upon the question of estoppel they cited, among other authorities, *Norton v. Kearney,* 10 Wis. 443; *Vilas v. Mason,* 25 Wis. 310; *McLean v. Dow,* 42 Wis. 610; *Kingman v. Graham,* 51 Wis. 232, 8 N. W. 181; *Loizeaux v. Fremder,* 123 Wis. 193, 101 N. W. 423; *Two Rivers Mfg. Co. v. Day,* 102 Wis. 328, 78 N. W. 440; *Smith v. Willing,* 123 Wis. 377, 101 N. W. 692; *McCord v. Hill,* 117 Wis. 306, 94 N. W. 65; *Williams v. J. L. Gates L. Co.* 146 Wis. 55, 130 N. W. 880; *Mariner v. Milwaukee,* 146 Wis. 605, 131 N. W. 442; *Harley v. Harley,* 140 Wis. 282, 122 N. W. 761; *Appleton Mfg. Co. v. Fox River P. Co.*

111 Wis. 465, 87 N. W. 453; *Kirk v. Hamilton,* 102 U. S. 68; *Strasser v. Goldberg,* 120 Wis. 621, 98 N. W. 554; *Wis. O. L. Co. v. Laursen,* 126 Wis. 484, 105 N. W. 906; *Lyndon L. Co. v. Sawyer,* 135 Wis. 525, 116 N. W. 255; *Kimball v. Baker L. & T. Co.* 152 Wis. 441, 140 N. W. 47. As to the power of the court to retain jurisdiction to administer suitable relief: *Fleming v. Ellison,* 124 Wis. 36, 102 N. W. 398; *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55; *Franey v. Warner,* 96 Wis. 222, 71 N. W. 81; *Luetzke v. Roberts,* 130 Wis. 97, 109 N. W. 49; *Cole v. Getzinger,* 96 Wis. 559, 71 N. W. 75; *Grant M. Co. v. Abbot,* 142 Wis. 279, 124 N. W. 264; *Combs v. Scott,* 76 Wis. 662, 45 N. W. 532; *Rock Co. v. Weirick,* 143 Wis. 500, 128 N. W. 94. The land in question was a part of the gravel pit sold, actually in use as such, and passed to the grantee even though the title stood in the individual name of *Garvens. Van Horn v. Richardson,* 24 Wis. 245; *Green Bay & M. C. Co. v. Hewitt,* 66 Wis. 461, 29 N. W. 237; *Cox v. Howell,* 108 Tenn. 130, 65 S. W. 868, 58 L. R. A. 487 and notes; *Wilson v. Hunter,* 14 Wis. 683.

H. J. Rooney, for the respondents *Elkhart Lake Sand & Gravel Company* and *Garvens,* contended that specific performance could not be enforced against the corporation because it never had title, nor against *Garvens* because he never contracted to convey. 4 Pomeroy, Eq. Jur. (3d ed.) § 1405; *Bardon v. Hartley,* 112 Wis. 74, 87 N. W. 809; *Auer v. Mathews,* 129 Wis. 143, 108 N. W. 45; *Schneider v. Reed,* 123 Wis. 488, 101 N. W. 682; *Park v. M., St. P. & S. S. M. R. Co.* 114 Wis. 347, 89 N. W. 532. Equity will not retain jurisdiction to award damages where the facts were all known to plaintiff when he brought the suit. 1 Pomeroy, Eq. Jur. (3d ed.) § 237; *Luetzke v. Roberts,* 130 Wis. 97, 109 N. W. 49; *Park v. M., St. P. & S. S. M. R. Co., supra; Rock Co. v. Weirick,* 143 Wis. 500, 128 N. W. 94; *Franey v. Warner,* 96 Wis. 222, 71 N. W. 81.

Francis Williams, for the respondents *Feldmann, Laun,* and *Elkhart Sand & Concrete Company.*

MARSHALL, J. The appeal presents this for solution: If an agent induces another to contract for the purchase of the principal's land by fraudulently pointing out its boundaries so as to include land of his own, and such other is let into possession accordingly and, later, such agent hands such other a deed and abstract, careful examination of which would disclose the facts, but it is reasonably delayed, the purchase money being as matter of accommodation paid in advance thereof, and such other within a reasonable time discovers such facts, insists upon having the omitted part and is not barred of right thereto by negligence, and the agent thereafter, by successive conveyances, causes title thereto to be vested in a distant party, each concerned having knowledge, or reasonable means of knowledge, of the truth,—may such person efficiently claim it and have relief in equity to confirm title thereto in him of record?

The trial court ruled in the negative, since, as was supposed, an agent cannot lose title to his land by estoppel because of having fraudulently represented it as the property of his principal in conducting a sale of the latter's property, not referring to any authority, elementary or judicial, in support thereof. There is none of which we are aware. On the contrary, the inquiry seems to be plainly ruled in the affirmative by the familiar elementary principle of estoppel *in pais* by which title to the land of one who has fraudulently induced a person to buy the property as that of another, is taken from him and vested in such person, if otherwise, without want of due care on his part, he would be pecuniarily injured.

In general, he who in dealing with another negligently or designedly misrepresents the facts, or, when he ought to speak, omits to disclose the truth for the purpose of inducing such other to, or with reasonable ground to expect he will, change his position in reliance thereon, is estopped to assert the truth to such other's injury. *Two Rivers Mfg. Co. v. Day,* 102 Wis. 328, 78 N. W. 440; *Frels v. Little Black F.*

M. Ins. Co. 120 Wis. 590, 98 N. W. 522; *Marling v. Nommensen,* 127 Wis. 363, 106 N. W. 884. The rule has no such infirmity that an agent can fraudulently represent his own property as that of his principal, and induce a purchase by means thereof, and then escape from losing what he so misrepresented because of his having falsified while acting as agent. The doctrine of estoppel penalizes for the wrong and so as to effectually remedy it as practicable. In a case of the sort before us, from the very logic of the principle, it bears on the person committing the fraud and those claiming under him with knowledge, as the only way of affording, as to the person wronged, the very thing which the wrongdoer fraudulently represented such person would obtain by dealing as he proposed. The instrumentality operates in favor of the one who has been misled though the fraud,—acts upon the wrongdoer and any one responsible for the mischief, *respondeat superior,* or because of ratification, and it is effectual to take title to land from one and vest it in another, where justice requires that to be done. It is a rule of last resort, but, as said in *Marling v. FitzGerald,* 138 Wis. 93, 101, 120 N. W. 388, when it is aroused into activity:

"It stays the operation of other rules which have not run their course [with the possible exception of the statute of limitations], when to allow them to proceed further would be a greater wrong than to permanently enjoin them. It is a rule of justice which, in its proper field, has a power of mastery over all other rules," that it is "entitled to the distinction of being one of the greatest instrumentalities to promote the ends of justice which the equity of the law affords."

Many illustrations are found in our own books of the application of the doctrine of estoppel *in pais* to change title to realty from one person to another to save the latter from the consequences of the former's fraudulent representations on the faith of which such other acted. The following are a few of them: *Peabody v. Leach,* 18 Wis. 657; *North v. Henneberry,*

44 Wis. 306; *Two Rivers Mfg. Co. v. Day,* 102 Wis. 328, 78 N. W. 440; *McCord v. Hill,* 117 Wis. 306, 94 N. W. 65; *Mariner v. Milwaukee,* 146 Wis. 605, 131 N. W. 442. In *Kingman v. Graham,* 51 Wis. 232, 8 N. W. 181, it was distinctly held that one may lose title to his land to another by active fraud, but not by mere silence with no more than a mere moral obligation to speak, quoting this from *Brant v. Virginia C. & I. Co.* 93 U. S. 326:

"And it would seem that to the enforcement of an estoppel of this character with respect to the title of property such as will prevent a party from asserting his legal rights, and the effect of which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established."

This case would satisfy, fully, the aggravated characteristics thus mentioned though later authorities seem to indicate that, to designedly or inexcusably mislead another is sufficient, as in *Two Rivers Mfg. Co. v. Day, supra,* and *Mariner v. Milwaukee, supra.* There the more modern doctrine, as gathered by text-writers from the trend of judicial administration, was adopted. 2 Pingrey, Real Prop. § 1220. One should not be misled, in a case of this sort, by failing to distinguish between estoppel by covenant and estoppel *in pais.* Each operates in its appropriate field and is quite as effectual as the other, as indicated in *North v. Henneberry, supra.*

It is suggested that the doctrine aforesaid is in violation of the statute of frauds when applied to real-estate titles. Not so, as uniformly held. The statute of frauds was not designed to enable the evil-disposed to possess an instrumentality with which to perpetrate fraud. It is the weapon of the written law to prevent fraud while the doctrine of estoppel is that of the unwritten law to prevent like evil. Each is effective in its appropriate field. Both are essential to prevent and redress wrongs. Courts elsewhere, as well as our own, have uniformly dealt with this subject as not impairing

the integrity of the statute in case of the taking of title to realty from one and vesting it in another being necessary to prevent the latter from suffering loss in consequence of having acted upon that one's false representations. *Bell v. Goodnature,* 50 Minn. 417, 52 N. W. 908; *Richardson v. Chickering,* 41 N. H. 380; *Louks v. Kenniston,* 50 Vt. 116; *Stanwood v. McLellan,* 48 Me. 275. The cases decided here and these authorities well illustrate how effectually the principle of estoppel *in pais* operates in such circumstances as were disclosed in this instance.

If the foregoing were not sufficient to dispose of this case in appellant's favor, a reversal would be necessary because of the trial court having taken too narrow a view of its competency to deal with a situation in equity, upon its appearing that there is no sound basis for other than legal relief, and the facts were known to the plaintiff in the beginning. There is no question, even from the trial court's point of view, but that a cause of action was stated in equity and, if that were not so, yet the action was commenced in the good-faith belief that equitable relief was obtainable on the facts. Moreover, no objection was made by answer or demurrer to the court's dealing with the matter.

The mere circumstance of itself that appellant knew the facts when the action was commenced would not require a dismissal because of facts not being established warranting equitable relief if, notwithstanding, good cause for legal relief was shown. Having properly acquired jurisdiction, in such a case, a court of equity has very broad power to wind up the entire controversy appearing from the pleadings and evidence, whether legal or equitable relief, or both, be required, as the following will show: *Franey v. Warner,* 96 Wis. 222, 71 N. W. 81; *Cole v. Getzinger,* 96 Wis. 559, 71 N. W. 75; *Stevens v. Coates,* 101 Wis. 569, 78 N. W. 180; *Gates v. Paul,* 117 Wis. 170, 94 N. W. 55; *Luetzke v. Roberts,* 130 Wis. 97, 109 N. W. 949.

It should not be thought that the facts of any one of those cases clearly indicate the entire scope of the rule. Difficulty often happens from taking the circumstances of some particular controversy as measuring the rule of the decision in respect thereto, instead of the rule merely applying to the facts as it might to many somewhat similar conditions. The principle itself is stated as fully, perhaps, as anywhere in *Gates v. Paul, supra,* thus:

"If one sues in equity in good faith and fails to establish his cause but shows a state of facts entitling him to recover at law, the court, having rightfully obtained jurisdiction for a proper purpose, may retain the cause and grant just such relief as upon the facts the plaintiff appears entitled to, whether at law or in equity."

The different adjudications on the subject are, to some extent, reviewed in *Stevens v. Coates, supra.*

I may be permitted to say for myself, in passing, that where warrant can be found in the Code for dismissing an action, under any circumstances, merely because relief was sought in equity and the nature of the redress warranted by the proven facts is legal only, I have never been able to find. Neither have I been able to appreciate how the practice to the contrary, to any extent, was retained under the Code. We have but one form of action, one form of complaint, one method of forming issues, and one court for the trial thereof. There is no jurisdictional question, in the technical sense, which could arise as to whether a cause of action should be constructively in a court of equity or in a court of law. The court having jurisdiction in one aspect has jurisdiction in the other. In either case the complainant is required in plain and concise language to tell his story, and he is entitled thereon, the facts being established, to just such relief as is appropriate to redress any wrong or vindicate any right which is within the competency of the court to grant. In case the matter requires interference by a jury, it is under the control of the court to give it that direction as matter of administra-

tion. The cause can be dismissed as to some parties, other parties may be brought in if necessary, and the whole subject dealt with according to the real necessities of the case, as indicated by the facts pleaded and properly established. Why then need a party entitled to judicial relief of some sort on the pleaded and established facts, be turned out of court without it?

It follows from what has been said that the judgment appealed from must be reversed and the cause be remanded for judgment in appellant's favor, establishing its title to the disputed premises against all parties to the action and, if necessary, charging the one holding it of record as trustee for plaintiff and requiring a transfer from that one in an appropriate way; that is, by the party or by the court under its equity power in that regard in lieu thereof.

The costs for printing on the appeal must be specially limited because of the case being needlessly long. No more than $75 can be allowed.

By the Court.—The judgment is reversed, and the cause remanded for judgment in appellant's favor as indicated in the opinion.

A. D. BAKER Co., Appellant, vs. BOOHER and others, Respondents.

April 9—April 29, 1913.

Debtor and creditor: Fraudulent conveyances: Division of debtor's estate in divorce action: Property awarded to wife not subject to subsequent judgment against husband.

1. A conveyance of a farm by the owner and his wife to their sons in consideration of maintenance of the parents so long as they should live, reserved to said owner mineral and timber rights in the land. The husband also had other property, not shown to have been insufficient to cover his indebtedness at that time. Subsequently, in an action for divorce, the court awarded to the

wife all the right, title, and interest which the husband had in the farm so conveyed. Afterwards a creditor obtained judgments upon notes given by the husband prior to said conveyance, and then brought action to set aside the conveyance as fraudulent and to subject the land to the lien of his judgments. *Held* that, there having been no fraud in the divorce proceeding, the wife cannot be deprived of the interests awarded to her, and hence that the creditor could not subject the land to the lien of his judgments.

2. Even if the conveyance to the sons was in fraud of creditors, the wife's participation therein did not deprive her of all her marital rights and claims to the property or affect her right to a final division of the husband's estate in the divorce action; and the judgment in that action must be treated as final so far as it is involved in the action by the creditor.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *C. W. Graves* and *A. F. Drew*, and oral argument by *Mr. Graves.*

L. H. Bancroft, for the respondents.

SIEBECKER, J. Plaintiff, an Ohio corporation licensed to do business in Wisconsin, brings this action to set aside a transfer of a farm by the defendants *Isaiah Booher* and his wife, *Mary*, to their sons *Clarence* and *Scott Booher*, and to subject the real estate to the lien of certain judgments plaintiff has secured against the defendant *Isaiah Booher.*

The facts as found by the court are practically undisputed and are in substance these: The defendant *Isaiah Booher* and his wife, *Mary*, were for many years before the commencement of this action residents of Richland county. They, with their sons *Clarence* and *Scott*, occupied and cultivated a farm of 600 acres situated in this county. Up to January 6, 1906, the farm was owned by *Isaiah Booher.*

On November 7, 1905, *Isaiah Booher* purchased from the plaintiff a threshing outfit costing $1,790.75, for which he gave his six notes to the plaintiff, maturing in one, two, three, four, five, and six years from date, with interest. In March,

1906, he purchased other property of the plaintiff and gave his notes for the purchase price thereof in the sum of $160. At the time of purchasing the threshing outfit *Isaiah Booher* made a written statement for the purpose of obtaining credit for the purchase of this threshing outfit, to the effect that he owned this farm, describing same, of 600 acres in fee simple; that it was worth $30,000; that it was free from incumbrances excepting the unpaid balance of $6,000, due in November, 1909, secured by two mortgages on the premises; that he owned personal property valued at $5,000, free from incumbrances, and that no judgments existed against him.

On January 6, 1906, *Isaiah Booher* and his wife by warranty deed conveyed the 600-acre farm and the personal property situated thereon to their son *Clarence,* reserving timber and mineral rights. In consideration of such transfer the son *Clarence* agreed to convey an undivided half interest in all the real and personal property embraced in the transfer to his brother, *Scott,* when he attained the age of twenty-one years, and the sons were to care for, provide, and maintain *Isaiah Booher* and his wife, *Mary,* pursuant to the terms stipulated in the deed during the rest of their natural lives; and no other consideration was paid for such property.

On June 14, 1909, the son *Clarence* conveyed to his brother, *Scott,* who was then of age, an undivided half interest in the property, and the mother, *Mary Booher,* on the same day conveyed to *Clarence* all her right, title, and interest therein which she had acquired under a decree of divorce rendered September 14, 1906, awarding her a divorce from her husband, *Isaiah,* and transferring to her, as a final division of his property, all the right, title, and interest *Isaiah Booher* had in and to the property conveyed to the sons. The court found that this divorce action was brought and prosecuted in good faith by *Mary Booher* and that the decree therein was awarded upon good and lawful grounds and was not tainted by any fraud of the parties. From the time of the

rendition of the divorce judgment to the commencement of this action, *Isaiah Booher* and *Mary Booher* resided on the farm and a portion of the time in the same dwelling house, and have been supported and maintained from the proceeds and income therefrom.

At the time *Isaiah Booher* purchased the threshing-machine outfit from the plaintiff, his wife and sons knew that he had obtained it on credit and owed plaintiff the whole purchase price; that he had given plaintiff notes to evidence the debt, and to secure payment thereof had executed a chattel mortgage on this property so purchased.

On August 7, 1906, the plaintiff seized all of the machinery under the chattel mortgage and bought it at a sale under the chattel mortgage for $800. This foreclosure and purchase was prior to the time the first note was due and before judgment was obtained against *Isaiah Booher*.

It appears that *Isaiah Booher* retained title to twenty acres of land situated about three quarters of a mile from the home farm, which he subsequently sold for $500. He also owned 180 acres of land in Vernon county, which he subsequently sold, receiving as consideration other lands and some cash. He also had a stock of goods with an indebtedness thereon of $1,900. The estimated value of the goods by the defendant was about double the amount of the indebtedness thereon. One of plaintiff's witnesses testifies that it was worth about $200. At the trial it appeared that the personal property and *Booher's* interests in real estate held in his own name, after transferring the home farm to his sons, was either seized in legal proceeding or by him applied to pay debts in the summer and autumn of 1906. The plaintiff recovered a judgment on the first note after its maturity in November, 1907, and on other notes in January, 1909; on which judgments there remained unpaid the sum of $1,238.75 when this action was commenced.

The trial court found that the transfer of the farm in Jan-

uary, 1906, was made in good faith and without any fraudulent intent by the parties thereto and that the divorce action was prosecuted in good faith upon legal grounds; that the proceeding was free from collusion and fraud, and that the judgment awarding the wife all the right, title, interest, and equity the husband had in the farm constituted a final division and distribution of the husband's estate. Under the decree the wife became vested with all the interests her husband, at that time, had in the property embraced in the decree. It operates to bar her dower and homestead rights in any property of the husband. It also results from this decree that whatever property she acquired by it constitutes her separate estate, and that the judgment is final and conclusive and not open for alteration after the term at which it was rendered. *Gallager v. Gallager,* 101 Wis. 202, 77 N. W. 145; *Donovan v. Donovan,* 20 Wis. 586; *Kistler v. Kistler,* 141 Wis. 491, 124 N. W. 1028.

The wife's dower interest in the farm would in no way be affected if it were established that the conveyance of *Isaiah Booher* to his sons was in fraud of his creditors. The contention that her participation in her husband's conveyance to the sons, in fraud of his creditors, deprived her of all her marital rights and claims to this property has no foundation. *Munger v. Perkins,* 62 Wis. 499, 22 N. W. 511; *Huntzicker v. Crocker,* 135 Wis. 38, 115 N. W. 340. If it be assumed, as contended, that the deed from *Isaiah Booher* to his sons is void as to creditors, this in no way affected the wife's rights to a final division and distribution of the husband's estate in the divorce action. As above stated, the divorce action was based on good and lawful grounds and the parties thereto were not guilty of any collusion or fraud in prosecuting the same to final judgment.

The evidence in the case fails to show that *Isaiah Booher* did not retain sufficient property in his own name at the time he conveyed the farm to his sons in January, 1906, to cover

his indebtedness, if providently applied. It cannot, therefore, be said that he was an insolvent after parting with the home farm. The fact that there was no fraud in the divorce proceeding and that *Isaiah Booher* retained the property he did when the farm was transferred made it proper for the court, in the divorce action, to proceed to make a final division and distribution of his estate, having due regard for the legal and equitable rights of the parties, their character and situation, the husband's ability, and all the circumstances of the case, as provided by sec. 2364, Stats. The divorce judgment fixed her rights, and since there is no question of fraud in obtaining this decree, her rights, after having become fixed by the judgment of the court, are as much entitled to the protection of the law as the claims of the husband's creditors. In any legal proceeding by the plaintiff for the collection of its debt, the divorce judgment must be treated as final so far as it is here involved. It is considered that the defendant *Mary Booher* cannot be deprived of the interests awarded her in the property embraced in the divorce judgment; that she owns it as her separate estate, and hence the plaintiff cannot subject these premises to the lien of its judgments as demanded in the complaint.

By the Court.—The judgment appealed from is affirmed.

PLUTO POWDER COMPANY, Appellant, vs. CUBA CITY STATE BANK, Respondent.

April 9—April 29, 1913.

Principal and agent: Negotiable paper: Execution and indorsement: Authority when implied: Liability of third persons: Ratification: Appeal: Review: Sufficiency of exceptions.

1. **One who cashes a check upon the unauthorized indorsement of an agent of the payee is liable to the principal in case the proceeds are misappropriated by the agent.**

2. The facts that an agent has possession of the goods of his principal for sale, that he is accustomed to receive checks for goods sold, payable to his principal, and sometimes collects money on sales, that he receipts for goods and also for moneys collected in the name of the principal, and has authority to employ help, to incur expense for livery, and to include livery bills in his account, do not clothe such agent with apparent or implied authority to indorse the principal's name upon checks so received or other negotiable paper.
3. Authority to execute or indorse negotiable paper will not be implied from express authority to transact some other business, unless it is necessary to the exercise of the express authority.
4. Third persons having notice that they are dealing with an agent are bound to inform themselves of the extent and limitations of his authority.
5. Even an agent with general authority to manage the business of his principal has not, by reason thereof, implied power to execute or indorse negotiable paper.
6. That the principal succeeds in obtaining from the agent part of the proceeds of checks unlawfully indorsed by him, is no evidence of ratification of his act in indorsing the same.
7. An exception to the refusal of the court to make a contrary finding, as requested, is a sufficient exception to the finding made to entitle the party excepting to a review thereof on appeal.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

This action was brought to recover from the defendant the amount of certain checks drawn to plaintiff's order, indorsed in its name by its agent, and the amount of a sight draft drawn by the agent of the plaintiff in its name, upon which checks and sight draft the defendant bank collected the money and paid it to the plaintiff's agent. The complaint alleges that between January 28, 1909, and April 30, 1909, plaintiff was the owner of certain checks which were in the possession of one Robinson, its agent, at Cuba City, Wisconsin, where the defendant bank is located; that the said agent without authority indorsed the checks in the name of the plaintiff and obtained the money thereon from the defendant; that on April 30, 1909, said Robinson without authority drew a draft for $200 upon a certain mining company, and without authority signed plaintiff's name thereto and deliv-

ered the same to the defendant and obtained the amount thereof from said defendant; that said checks and draft amount to $1,910.40, of which sum plaintiff received only $1,210.40, leaving a balance of $700 due from defendant to plaintiff.

The answer contains certain admissions and denials. At the close of the evidence, by consent of parties, the jury was discharged and the case submitted to the court. The court made the following findings:

"1. That during the years 1908 and 1909 the plaintiff was a manufacturer of dynamite, with its principal office at Buffalo, New York.

"2. That in the summer or early fall of 1908 the plaintiff appointed one R. M. Robinson its agent at Cuba City, Wisconsin, with authority to sell the product of plaintiff at Cuba City and vicinity, and collect payment therefor from the parties to whom said product was sold.

"3. That the checks described in the complaint were checks given to the said R. M. Robinson, as agent of the plaintiff, by customers of plaintiff, in payment of dynamite purchased of plaintiff through said agent, R. M. Robinson.

"4. That the said R. M. Robinson, as agent of the plaintiff, had implied authority to indorse the name of the plaintiff upon and cash the said checks set forth in the complaint of plaintiff.

"5. That the said R. M. Robinson, as agent of the plaintiff, had implied authority to draw the sight draft set forth in the complaint, and that the plaintiff, with knowledge of the act of its said agent in drawing said sight draft, received and accepted from him the proceeds thereof.

"6. That the defendant acted in good faith in cashing said checks set forth in the complaint, without any knowledge or information that to do so was contrary to the wishes or authority of the plaintiff."

The court concluded that the defendant was entitled to judgment dismissing the plaintiff's complaint with costs. Judgment was entered accordingly, from which this appeal was taken.

Charles N. Brown, for the appellant, cited, among other authorities, 2 Bolles, Banking, 730; *Johnson v. First Nat. Bank,* 6 Hun, 124, affirmed 68 N. Y. 616; *Robinson v. Chemical Nat. Bank,* 86 N. Y. 404; *Schmidt v. Garfield Nat. Bank,* 138 N. Y. 631, 19 N. Y. Supp. 252; *Millard v. National Bank,* 3 MacArthur (D. C.) 54; 31 Cyc. 1336, 1341, 1382, 1383; 1 Am. & Eng. Ency. of Law (2d ed.) 987, 1030; *Cummins v. Beaumont,* 68 Ala. 204; *Sawyer v. C. & N. W. R. Co.* 22 Wis. 403; *Hurley v. Watson,* 68 Mich. 531, 36 N. W. 726; *Bohart v. Oberne,* 36 Kan. 284, 13 Pac. 388; Tiedeman, Comm. Paper, § 77; Mechem, Agency, §§ 382, 398; 1 Clark & Skyles, Agency, 619, 652; *Jackson P. M. Co. v. Commercial Nat. Bank,* 199 Ill. 151, 65 N. E. 136; *Hamilton Nat. Bank v. Nye,* 37 Ind. App. 464, 77 N. E. 295; *Wm. Deering & Co. v. Kelso,* 74 Minn. 41, 76 N. W. 792; *Graham v. U. S. Sav. Inst.* 46 Mo. 186; *Jackson v. Bank,* 92 Tenn. 154, 20 S. W. 802; *Goodell v. T. M. Sinclair & Co.* 112 Ill. App. 594.

S. E. Smalley, for the respondent.

KERWIN, J. The only serious question in this case is whether the agent, Robinson, had authority, implied or otherwise, to indorse checks made in favor of plaintiff given in payment of goods sold or to draw drafts in the name of plaintiff. It is clear that the agent had no express authority. The court below found that Robinson had implied authority, and the question arises whether such finding is supported by the evidence. The appellant deals in explosives, with headquarters in New York. In the summer of 1908 one Robinson was employed as representative of plaintiff at Cuba City, Wisconsin, to make sales of goods. The goods were shipped by plaintiff to Robinson, usually in carload lots, freight prepaid, addressed to *Pluto Powder Company.* The bills of lading were sent to Robinson and he received the goods from the railroad company, placed them in plaintiff's magazine at Cuba City,

sold to mining companies and others, and reported sales to the office of plaintiff in New York, and invoices were sent to the purchasers by plaintiff from its office. It was understood that the purchasers, generally, should remit to the office of the plaintiff, although some small sales were made for cash and the money collected in such instances by Robinson. He also had authority to collect from two mining companies, who for certain reasons desired to deal directly with him. It was his duty in all cases to remit checks and drafts received in payment of goods to the plaintiff, and if he received cash to remit that by draft, but he had no authority to sign the name of the plaintiff to commercial paper in any case unless such authority can be implied from the acts and dealings of Robinson with the defendant and purchasers of goods. We find no evidence in the record sufficient to charge the plaintiff with notice that Robinson ever signed its name to negotiable paper until about the 30th of April, 1909, when due investigation was made, the defalcation discovered, and Robinson discharged. So that all checks and drafts, the proceeds of which are claimed in this action, were negotiated and the name of plaintiff signed thereon before the plaintiff had knowledge that Robinson signed its name to commercial paper.

The question, therefore, is presented whether the fact that Robinson acted as salesman of plaintiff, had possession of its goods, and received checks payable to plaintiff, receipted for goods in the name of plaintiff, collected some money on sales when checks were not given payable to plaintiff, receipted for money collected in plaintiff's name, had authority to employ help, incur expense for livery, and to include livery bills in his account, clothed Robinson with implied or apparent authority to sign the name of plaintiff to commercial paper. We think the great weight of authority is to the effect that upon the undisputed evidence in this case Robinson had no authority, express or implied, to sign the name

of plaintiff to negotiable paper. In the instant case the defendant cashed the checks drawn payable to plaintiff upon the unauthorized signature by Robinson of the name of plaintiff. Robinson also drew a draft in the name of plaintiff and obtained the money thereon without authority. The bank therefore became liable to the plaintiff, the funds having been misappropriated by Robinson. *Robinson v. Chemical Nat. Bank,* 86 N. Y. 404; *Schmidt v. Garfield Nat. Bank,* 64 Hun, 298, 19 N. Y. Supp. 252, affirmed 138 N. Y. 631, 33 N. E. 1084; *Hogg v. Snaith,* 1 Taunt. 347.

Since no express authority was given Robinson to indorse or sign negotiable paper on behalf of plaintiff, such power must be shown to be necessary to the exercise of the power conferred, and the burden was upon the defendant to show implied authority. *Ames v. D. J. Murray Mfg. Co.* 114 Wis. 85, 89 N. W. 836; *Parr v. Northern E. M. Co.* 117 Wis. 278, 93 N. W. 1099; *McDermott v. Jackson,* 97 Wis. 64, 71, 72 N. W. 375; *Heath v. Paul,* 81 Wis. 532, 51 N. W. 876; *Jackson P. Co. v. Commercial Nat. Bank,* 199 Ill. 151, 65 N. E. 136. Third persons having notice that they are dealing with an agent are bound to inform themselves of the extent and limitations of his authority. 31 Cyc. 1336, 1341; *Sawyer v. C. & N. W. R. Co.* 22 Wis. 403; *Hurley v. Watson,* 68 Mich. 531, 36 N. W. 726; *Bohart v. Oberne,* 36 Kan. 284, 13 Pac. 388. Tiedeman on Commercial Paper, § 77, states the rule thus:

"We have this general rule that applies to all cases of implied agencies, that no authority will be implied from an express authority, unless it is positively needful for the performance of the main duties contemplated by the express authority. . . . And the execution and negotiation of commercial paper are considered by the commercial world so liable to the infliction of injury on the principals, if this authority is given to agents,—the general custom being to reserve this power for personal exercise,—that the presumption of the law is more strongly opposed to an implied authority to exe-

cute and negotiate commercial paper than to do anything else. Hence, in this connection, the rule is strictly enforced, that the authority to execute and indorse bills and notes as agent will not be implied from an express authority to transact some other business, unless it is *absolutely* necessary to the exercise of the express authority."

The authorities very generally hold that an agent with general authority to manage the business of his principal has not, by reason thereof, implied power to indorse or execute negotiable paper. Tiedeman, Comm. Paper, § 77; Mechem, Agency, §§ 398, 382; 1 Clark & Skyles, Agency, 619, 652; 1 Am. & Eng. Ency. of Law (2d ed.) 1030; 31 Cyc. 1382, 1383, and cases cited; *Jackson P. Co. v. Commercial Nat. Bank,* 199 Ill. 151, 65 N. E. 136; 1 Daniels, Neg. Inst. (5th ed.) § 297.

The mere fact that Robinson had authority to receive negotiable paper in payment for goods sold carried with it no power to indorse it. *William Deering & Co. v. Kelso,* 74 Minn. 41, 76 N. W. 792; *Jackson v. Bank,* 92 Tenn. 154, 20 S. W. 802; *Graham v. U. S. Sav. Inst.* 46 Mo. 186.

We also desire in passing to briefly refer to the manner in which business was transacted between Robinson and the bank. Robinson opened a personal account with the defendant. He had but very little money of his own to his credit, and indorsed checks payable to plaintiff for large sums and placed the money to his own credit in his personal account. There can be no doubt under the evidence but that the defendant knew that he was mingling the plaintiff's funds with his own when he cashed checks through the defendant bank by signing the name of the plaintiff thereon and leaving the funds to his own credit in defendant bank. It is clear from the evidence that there was no necessity for him, in the discharge of his duties as agent, to indorse the checks or make the sight draft as he did through the defendant bank.

We shall briefly consider the principal authorities cited to our attention by counsel for respondent.

31 Cyc. 1373, states the rule that where an agent is employed to make collections he is presumed to be clothed with such powers as are usual and necessary to insure success in collecting. And it is further said: "The authority of an agent employed to make collections, however, carries no implied power to transfer or sell negotiable paper, or other interest-bearing debt, nor to collect such paper before maturity."

In *Ballston Spa Bank v. Marine Bank,* 16 Wis. 120, a cashier of a bank executed a promissory note to borrow money in the business of the bank and the money was actually used by the bank in its business and the loan acquiesced in by the board of directors. Held, that the bank ratified the act of the cashier in giving the note, which ratification was equivalent to previous express authority and the bank was liable.

Kasson v. Noltner, 43 Wis. 646, holds that a principal is responsible for the acts of his agent when he has either given the authority to do the act or justified the party dealing with the agent to believe that the latter had such authority. To the same effect are *Bouck v. Enos,* 61 Wis. 660, 21 N. W. 825; *Bentley v. Doggett,* 51 Wis. 224, 8 N. W. 155; and *Andrews v. Robertson,* 111 Wis. 334, 87 N. W. 190.

Lorton v. Russell, 27 Neb. 372, 43 N. W. 112, is relied upon as being specially in point. But in that case as in others relied upon the rule of apparent authority and ratification governed the case. In the instant case there is not sufficient evidence to support the findings to the effect that Robinson had apparent authority to make or indorse negotiable paper in the name of plaintiff or that there was ratification as regards any of the paper which is the basis of this action.

Some claim is made by counsel for respondent that plaintiff ratified the drawing of the draft and indorsement of checks. But there is no evidence in the record sufficient to support a finding of ratification. The plaintiff had no knowledge that Robinson made the sight draft or indorsed the

checks until its manager arrived at Cuba City on or about April 30, 1909, and the fact that plaintiff's manager succeeded in obtaining from Robinson on May 1st some of the money unlawfully obtained by him was no evidence of ratification.

It is also insisted that the fourth finding, denominated a finding of fact, not having been excepted to, must be treated as a verity, and that it controls the case against the appellant because it establishes that the agent, Robinson, had authority to make the sight draft and indorse the checks in the name of the plaintiff. Even conceding for the purpose of this case that this finding is a finding of fact, we think it was sufficiently excepted to.

The question of implied authority was directly raised, as appears from the record, by the exception to the refusal of the requests of the plaintiff that the court make certain findings, one of which was that "The defendant had no reason to believe that the said R. M. Robinson had any authority to indorse the name of the plaintiff on any of the checks mentioned in the said complaint or to draw the sight draft therein." This amounted to a sufficient exception to the contrary finding made to entitle plaintiff to review it here. We hold that the fourth and fifth findings of fact are against the clear preponderance of the evidence.

Counsel for plaintiff requested the court below to find that Robinson had no express authority to indorse the name of the plaintiff upon checks, and that until the 29th day of April, 1909, and until after the last of such checks had been indorsed by Robinson in the name of the plaintiff, no officer of the plaintiff had any knowledge that Robinson had indorsed the name of the plaintiff to any check or instrument for the payment of money, and that Robinson as agent of the plaintiff had no express authority to draw the sight draft set forth in the complaint, and that the defendant had no reason to believe that Robinson had any authority to indorse the

name of the plaintiff upon any of the checks mentioned in the complaint or to draw the sight draft. Under the evidence produced these findings should have been made and judgment ordered for the plaintiff.

By the Court.—The judgment of the court below is reversed, and the cause remanded with direction to enter judgment for the plaintiff.

McNELLY, Administratrix, Respondent, vs. MARSHALL, Administrator, Appellant.

April 9—April 29, 1913.

Husband and wife: Gifts* inter vivos: *Certificates of deposit payable to wife: Evidence.

In an action between the personal representatives of a husband and wife, both deceased, involving the ownership of certificates of deposit payable to the wife, the evidence (stated in the opinion), tending to show that she had possession of such certificates and that the money represented thereby might have been given to her by the husband, is *held* to sustain the finding of the trial court that the certificates were her separate property and belong to her estate.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Bancroft & Johns,* and oral argument by *L. H. Bancroft.*

For the respondent there was a brief by *Burnham & Black,* and oral argument by *O. D. Black.*

TIMLIN, J. The findings of the circuit court are to the effect that Harvey and Samantha Marshall, he a widower with children, and she a widow with children, were married about thirty-five years ago, resided together up to the time

of her death upon a farm in Richland county belonging to Harvey, and accumulated considerable property and money. There was no issue of this marriage. She died intestate June 1, 1911, he died intestate January 12, 1912, and after her death there was found in her possession seven certificates of deposit on certain local banks, six of which were payable to Samantha and one to Harvey or Samantha Marshall. In this suit by her administratrix against his administrator the circuit court gave judgment in favor of the former and against the latter, entitling the former to the amount of these six certificates and half of the seventh, aggregating $3,705.

It is contended on this appeal that the *prima facie* case of ownership made by the written instrument is overcome by evidence (1) that at the time of marriage Samantha had no separate estate or property; (2) that the money represented by these certificates is the avails of farm products or live stock from the farm owned by Harvey; (3) that this money was by consent of Samantha assessed to Harvey; (4) that Harvey was quite illiterate and remained at home, while Samantha transacted most of the business and especially attended to the deposits in the banks and to the renewals of the certificates of deposit during the thirteen years covered by these deposits; she had made some of them in her name, some in the name of Harvey Marshall, and some of them in the name of Harvey or Samantha Marshall, but at last had renewed six of them in her name; (5) after her death Harvey went to the banks and desired to cash the certificates, where he was informed that the certificates were in Samantha's name; (6) that there is no evidence that Samantha made any claim to own these certificates during her life, nor did her heirs after her death until it was learned that they were in her name; (7) that the finding of the circuit court that she had possession of the certificates is not supported by evidence; (8) that Samantha said to one of the officers of one bank, sometime before the last renewal in her name, that she

wanted the deposits made so that either she or her husband could draw the money, and that her husband was not able to transact business and she did it for him; (9) hence a conclusion that she was acting as the agent of her husband in making the deposits originally and could not therefore make title to this money as against him or his heirs.

The case is a close one. The probative effect of a fact, like the ornamental effect of a jewel, is much affected by its setting. Therefore analysis is not always a reliable test. This is particularly noticeable in fraud cases, where each fact detached and alone might have a probative value equal to zero; but grouped and set as the facts actually occurred may convincingly establish fraud. It however applies in a greater or less degree to all evidence. Keeping this in mind the following analytical treatment will not mislead: (1), (2), (4), and (6) have little probative force. We could almost as well say that they indicate a reason for Harvey making a gift as to say that they negative a gift; (3) is not significant because the statute then in force (sec. 1044, Stats. 1898) provided that the money of the wife might be assessed to the husband. (6) This is weakened by the fact that there was no occasion calling for the assertion of any claim of ownership upon her part. (7) We find some evidence tending to support the conclusion that she had possession of the certificates. These certificates were kept with deeds, tax receipts, and other papers in a box at the home of the old couple, presumably accessible to both, but found after the death of Samantha by her daughter, and by the latter delivered to Harvey. (5) and (8) tend to disprove a gift; and (9) is an argumentative inference from the situation and circumstances which assumes the whole controversy in favor of defendant. On the other hand, in addition to the written instruments there is the fact that the moneys in question were the product of the joint industry and self-denial of both husband and wife exerted in the operation and management of

his farm; the fact that the marital relations were happy; that Harvey left an estate, exclusive of these certificates of deposit in question, of the value of $28,000; that he made no other provision for her, and of course did not know which would die first, and that the earliest certificate, which was issued on January 18, 1898, was issued to her. In this state the wife by statute may receive property by gift from her husband. Sec. 2342, Stats. What arrangement with regard to this money existed between husband and wife, both now deceased, can never be definitely ascertained. We are not to presume that she was guilty of fraud. Whether this was a gift *inter vivos* or a series of gifts of different amounts made when she deposited money in her name or when she renewed the certificates in her name which were formerly in the name of both, no one can now determine with any degree of certainty. No one can say whether Harvey knew that she had made the deposits or renewed the certificates of deposit in her name and acquiesced therein with the intention that she should own the money. Under such circumstances the written instruments, with the finding of the circuit court in their favor, are entitled to great weight, and we are not convinced that the judgment should be reversed for failure of proof. The following cases deal with somewhat similar situations: *Qualters's Estate,* 147 Pa. St. 124, 23 Atl. 348; *Cummings v. Friedman,* 65 Wis. 183, 26 N. W. 575; *Mains v. Webber's Estate,* 131 Mich. 213, 91 N. W. 172; *Crosetti's Estate,* 211 Pa. St. 490, 60 Atl. 1081.

By the Court.—Judgment affirmed.

WILL OF YOUNG: GALE and another, Respondents, vs. FREEMAN and another, Appellants.

April 9—April 29, 1913.

Wills: Probate: Date of execution: Mental capacity: Place of signing: Revocation: Double signature: Obliteration of one.

1. In a proceeding for probate of a will, the evidence is *held* to sustain a finding by the trial court that a subsequent will (which was lost) was not executed by the testator until after June 25, 1903, at which time, by reason of injuries, he became mentally incompetent.
2. The fact that the testator's signature follows instead of precedes the attestation clause does not invalidate a will.
3. Where a will was regularly signed and sealed by the testator at the end of the attestation clause, and such signature was duly witnessed, the fact that a signature above the attestation clause was at some time wholly or partially obliterated does not prove a revocation.

APPEAL from a judgment of the circuit court for Trempealeau county: JAMES O'NEILL, Judge. *Affirmed.*

The testator, Wm. M. Young, made three wills in his lifetime. The first was a holographic will dated January 8, 1903. On January 26, 1906, he executed another will drawn by *George Gale*. Some time after January 8, 1903, he executed another will which was drawn by one Arnold. This will is lost and its date is uncertain.

The will of January 26, 1906, was refused probate because made when the testator was of unsound mind. The will of January 8, 1903, was then offered and admitted to probate, and it is from a judgment of the circuit court affirming the judgment of the county court admitting this will to probate that the contestants appeal. The court found that on June 25, 1903, Young received a severe fall and that thereafter he was mentally incompetent to make a will. It was further found that up to that time he had sufficient mental capacity to dispose of his property by will. No exception to these findings is taken by either party.

The contestants claim that the will drawn by Arnold was executed prior to February 13, 1903, when the testator was of sound mind, and that it contained a clause revoking all former wills made by him. The contents of this will are not very satisfactorily established. The court found that it was not proven that the will drawn by Arnold contained a revocation clause, and also found that this will was executed sometime after June 25, 1903, when the testator was found to be of unsound mind.

For the appellants there was a brief by *A. T. Twesme* and *Webber & Lees,* and oral argument by *Edward Lees.*

For the respondent *Gale* there was a brief by *Ekern & Eggum;* for the respondent *Arnold* a brief by *J. H. Hawthorne;* and the cause was argued orally by *O. J. Eggum.*

BARNES, J. For convenience the will drawn by Mr. Arnold for the testator will be referred to as the Arnold will. The appellants insist that the finding that this will was executed after June 25, 1903, is against the clear preponderance of the evidence and should be set aside; that the same is true in reference to the finding that such will did not contain a revocation clause; that the will of January 8, 1903, was canceled, and that it is so indefinite that the testator's intent cannot be ascertained from it.

If the finding that the Arnold will was executed after June 25, 1903, has sufficient support in the testimony, it is immaterial whether it contained a revocation clause or not, because concededly Young had not sufficient mentality to make a valid will after that time.

The witness Halderson testified that he saw and read the Arnold will on February 13, 1903. He fixes the date by the recital of circumstances which would indicate that he could not be mistaken, although the transaction took place about eight years before he testified. He is corroborated by the witness Wason, and there was at least one other transaction tes-

tified to which tended to corroborate the evidence of these witnesses.

There were no other witnesses who were able to give any direct and positive evidence as to when the will was executed. But a number of persuasive facts were testified to which strongly tended to show that the will was not executed until after June 25th. It would serve no useful purpose to detail these facts. The court evidently disbelieved the evidence of Halderson and Wason. The testimony of Halderson was tainted with suspicion, to say the least. His manner and demeanor on the stand might well have convinced the trial judge that he was not a truthful witness. There was an abundance of facts testified to from which the inference might have been drawn that Young was insane when the Arnold will was made and that it was made after June 25th. We say this without any desire to criticise Mr. Arnold for drafting a will for an insane man. For a time he refused to draw the will because he did not think Young competent, but finally acted after repeated requests, to get rid of the annoyance Young was causing him. We do not feel that the finding of the trial court should be set aside. The evidence was such that a finding either way on the question would not be disturbed in this court.

The will of January 8, 1903, was written by the testator on a single page of legal cap paper except that part of the attestation clause was carried over onto the second page. The will was signed on the first page in the proper place before the attestation clause, and the signature was at some time obliterated or partially so. The appellant argues that this in itself was a revocation of the will. We do not think so. The will was regularly signed and sealed at the end of the attestation clause. The witnesses to the will testify that this is the signature which they were called upon to witness and which they did witness. They further testify that they did not see the first page of the will or know its contents, and the infer-

ence is strong that the doctor did not want them to see this portion of the will and for this reason obliterated the signature which he had made on the first page and then signed on the second. If otherwise properly executed, published, and declared, the fact that the signature followed instead of preceded the attestation clause would not invalidate the will. And where we have an obliterated signature which was not witnessed and an admittedly genuine one not tampered with which was duly witnessed, the obliterated signature does not prove revocation. *In re Wood's Will,* 11 N. Y. Supp. 157.

As to the claim that the will is so indefinite and uncertain that the testator's intent cannot be ascertained from it, we express no opinion. The proper time to test that question is after the will is admitted to probate.

By the Court.—Judgment affirmed.

HOTCHKISS, Administrator, Appellant, vs. GREEN BAY & WESTERN RAILROAD COMPANY, Respondent.

April 9—April 29, 1913.

Negligence: Evidence: Verdict based on conjecture: Railroads: Running over child on track: Break in fence.

1. Where there is no direct evidence of how an accident occurred, and the circumstances are as clearly consistent with the theory of a nonactionable cause as a cause that is actionable, no foundation exists for a finding of negligence.
2. In an action against a railway company for the death of a six-year-old child run over by a gravel train, where there was some evidence of a board being broken from a gate leading onto defendant's right of way near where the accident occurred, but none that the deceased entered through such break, and a conjecture that he did so enter had no greater probability to sustain it than that he entered through, under, or over the fence at some other point, a finding by the jury that the child got upon the track by reason of the broken board in the gate was unwarranted.

3. It appeared in such case that the train consisting of seventeen loaded cars was running slightly down grade at a speed of twenty miles an hour; that the trainmen saw the deceased lying upon the track after rounding a curve about 500 feet distant, but were unable to distinguish his body as that of a human being until half that distance was passed, when every effort was made to stop the train without avail; and that one of the brakemen climbed down and attempted to shove him off the track but was too late. The evidence further tended to show that the engine and brakes had been recently inspected and were in good condition; that the deceased lay upon the track without movement, paying no attention to shouts or to the bell and whistle; and that his face was white like the face of the dead. *Held*, that there was no support for a finding that the defendant's servants in charge of the train were wanting in ordinary care in the operation and management of the same.

APPEAL from a judgment of the circuit court for Trempealeau county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to recover damages for the death of John Wainorek, a child six years of age, who was run over by defendant's gravel train, under circumstances stated in the opinion. The jury found (1) that there was a section of a board broken out of the gate of the fence on the south side of defendant's right of way at the point in question at the time of the accident; (2) that it had been broken out of the gate a sufficient length of time to have enabled the defendant in the exercise of ordinary care to have discovered and repaired the same before the time of the accident; (3) that John Wainorek got upon the defendant's track by reason of the broken board in the gate; (4) that he was not dead at the time he was struck by defendant's train; (5) that defendant's servants in charge of the train were wanting in the exercise of ordinary care in the operation and management thereof; (6) that such want of ordinary care was a proximate cause of the death of John Wainorek; (7) that the deceased was wanting in the exercise of ordinary care which contributed to his death; (8) that his parents were wanting in the exercise of ordinary care which contributed to his death; and (9) damages in the sum of $500.

From a judgment in favor of the defendant entered upon the verdict the plaintiff appealed.

G. O. Linderman and *John F. Kulig,* for the appellant.

For the respondent there was a brief by *Gaveney & Barlow,* and oral argument by *John C. Gaveney.*

VINJE, J. Counsel for plaintiff state in their brief that "the sole question submitted to the court is, Was there any evidence to sustain the findings of the jury that either the plaintiff's intestate, John Wainorek, or his parents, were wanting in any ordinary care that contributed to the death of plaintiff's intestate?" This is no doubt an interesting question under the evidence in the case, but before it can be reached by the court the defendant's negligence must be established to be the proximate cause of the death of John Wainorek. For if there was no negligence on the part of the defendant, or if there was, but it cannot be said with reasonable certainty that such negligence was the proximate cause of the injury, then no liability follows. A careful perusal of all the testimony in the case satisfies us that it does not support the third and fifth findings of the jury.

The parents of deceased lived about twenty rods south of defendant's railroad track, which at the point in question runs substantially east and west. From the house to the railroad track there is a fairly well beaten path leading to a gate on the south side of the track and a corresponding gate on the north side thereof. These two gates give access to a pasture lying north of the railroad. The path stops at the north gate. The evidence does not disclose who occupied or used the pasture. At about 4 o'clock in the afternoon of July 31, 1910, the deceased came to the field of a neighbor, Mr. Ressler, who was cutting grain about forty rods south of the railroad track, and inquired for Mr. Ressler's boys, stating that he wanted to play with them. He was told that they had to work, and Mr. Ressler next saw him in his field up towards the railroad

track, and did not see him again until after the accident, which occurred about twenty-five minutes later. Neither the father nor mother of the deceased gave any testimony as to the whereabouts of the boy on the afternoon of his death. The defendant was running a gravel train west from Whitehall to Arcadia at a rate of about twenty miles an hour. It consisted of about seventeen loaded cars. The engine was headed east pulling the cars behind it. On the front of the tender were two brakemen acting as lookouts. It was slightly down grade where the accident occurred. About 800 or 1,000 feet east therefrom was a deep cut, and a curve in the track extending about 500 feet west from the mouth of the cut. This train with the same crew had been hauling gravel over the track for two or three weeks previous to the time of the accident. The two brakemen and the roadmaster, Mr. White, who was in the engine looking ahead, noticed an object upon the track when about 500 feet away from it as soon as it became visible from the curve. When the train crew first discovered the object upon the track the brakeman and engineer thought it was a chunk of sod that had fallen from previous loads hauled over the road. The roadmaster, Mr. White, said it looked to him as though it was a bird, crow, or some object of that kind. He could not distinguish it as the body of a human being. The train was about 250 feet away from the boy before any of the members of the crew were able to recognize the object as a human being. John Goman, one of the brakemen, who acted as a lookout, first saw it was a boy and he said the train was then about 200 to 250 feet away. As soon as he discovered it was a child he gave the engineer a signal to stop. The engineer threw the steam off the cylinder, used the emergency application of the air-brake, blew the whistle, and rang the bell. He applied all the air there was and used every possible means to stop the train in the shortest distance. The brakeman John Goman "hollered" when he saw the child was not making any move

of any kind, and took a chunk of coal and threw it at the boy. The chunk struck the ground about a foot and a half away from the boy and kind of rolled up against him, but he made no movement of any kind. The brakeman Skiporski, after signaling the engineer to stop, slid down off the tender and onto the track, and tried to knock the boy off the track with his feet, but he was too late.

As near as can be ascertained from the testimony of the train crew, who were the only ones that saw deceased on the track, his head and body were lying directly outside of the south rail, with his legs crossed and resting on the south rail, on the calf of one of his legs just below the knee. His knees were drawn up over the rail, and he was lying about twenty feet west of the gates. He had on short pants, a light shirt, and was barefoot. They all testified that he made no movement whatever as the train approached him, and that the color of his face was the color of a dead person. The train was not stopped until the engine and cars had run over him. The crew hurried back and found the boy dead. There was no movement or muscular action of any kind that they could ascertain, and very little flow of blood. He was found with one leg cut off and the body cut in two above the hips. The testimony further showed that defendant's engine had been recently inspected and that it and the air-brakes were in good working order. The deceased was an active, healthy boy, six years one month and nineteen days old at the time of his death, and, so far as appears, of average intelligence for a boy of that age.

The jury found that the boy entered the track by reason of the broken board in the gate. There is a sharp conflict as to whether or not there was a broken board therein previous to the boy's death, many witnesses testifying that there was none until a part of one was taken off for the purpose of making a stretcher for the body after the coroner's inquest. But the finding that a board was broken off before his death is sup-

ported by evidence and cannot be set aside. We fail, however, to find any testimony that tends to show that the boy entered the track through the break in the gate, much less by reason thereof. Ressler, who saw him last before he came upon the track, said the boy was on the field of grain he was cutting up towards the railroad track, but whether near or far from the gate the evidence does not disclose. This was about twenty-five minutes before the accident. That a boy six years old would find no difficulty in getting through an ordinary fence is self-evident. The gate, if entire and closed, would have presented no obstacle to him had he desired to enter the track. So it cannot be said with any reasonable degree of certainty that the deceased entered the track through or by reason of the hole in the gate. It is mere conjecture that he did so, and a conjecture that has no more probability to sustain it than that he entered through, under, or over the fence at another point. Verdicts cannot rest upon mere conjecture or possibilities. *Collins v. Janesville,* 99 Wis. 464, 75 N. W. 88; *Hyer v. Janesville,* 101 Wis. 371, 77 N. W. 729; *Wing v. Stackhouse,* 143 Wis. 343, 345, 127 N. W. 955; *Houg v. Girard L. Co.* 144 Wis. 337, 348, 129 N. W. 633; *Marcott v. M., St. P. & S. S. M. R. Co.* 147 Wis. 216, 133 N. W. 37; *Zuwodnicek v. Higgins S. & A. Co.* 151 Wis. 118, 138 N. W. 48; *Kaszubowski v. Johnson S. Co.* 151 Wis. 149, 138 N. W. 54. In *Hyer v. Janesville, supra,* the authorities on this subject are collected and discussed, and it was there said:

"The principle of law does not admit of question or exception, that where there is no direct evidence of how an accident occurred, and the circumstances are as clearly consistent with the theory that it may be ascribed to a cause not actionable as to a cause that is actionable, it is not within the province of the jury to guess where the truth lies and make that the foundation for a verdict."

There is likewise no evidence whatever to support the finding that defendant's servants in charge of the train were

wanting in the exercise of ordinary care in the operation and management thereof. They were running a gravel train of seventeen loaded cars on a slightly down grade at the rate of about twenty miles an hour. That the engine was headed towards the train so the tender was ahead is not an unusual method of running such trains. Two brakemen sitting on the front of the tender acted as lookout, and they discovered the object on the track as soon as the train rounded the curve sufficiently for them to do so. Almost immediately afterward the engineer and Mr. White discovered it also; but all thought it was an inanimate object—or a bird of some kind. The brakemen testified they kept their eyes upon it, and as soon as they saw it was a human being they gave the signal to the engineer, who at the same time discovered that the object was a boy. The steam was then shut off, the air-brakes applied, bell rung, and whistle sounded. As before stated, the trainmen did everything in their power to avert the accident after they discovered that a human being was upon the track. When the position, immobility, and size of the boy is taken into account it is not strange that they came within about 200 feet of him before they were able to tell that the object on the track was a boy and not a piece of sod or some other inanimate thing.

Having reached the conclusion that the negligence of the defendant in maintaining a broken gate cannot with any reasonable certainty be found to be the proximate cause of the boy's death, and that the finding of negligence in the operation of the train is not supported by the evidence, it follows that there is no liability on the part of the defendant, irrespective of the contributory negligence of the deceased or his parents. The case is a peculiar one, and leaves upon our minds the impression of an unexplained mystery.

By the Court.—Judgment affirmed.

GILPIN, Respondent, vs. MATCHETT, imp., Appellant.

April 10—April 29, 1913.

Fraudulent conveyances: Intent: Knowledge of vendee: Evidence: Conditional sale.

1. **The question being whether a sale of personal property to defendant was void under sec. 2320, Stats., because made with intent to defraud the plaintiff, evidence of statements made by the vendor before the transfer, tending to prove a fraudulent intent on his part, was admissible for that purpose, although the statements were not made in defendant's presence.**
2. **Findings by the jury in such case that at the time he bought the property defendant had notice of the vendor's fraudulent intent and also of an unfiled contract for the sale of the property by plaintiff to said vendor by the terms of which the title was to remain in the plaintiff, are *held* to be supported by the evidence.**
3. **Actual knowledge on defendant's part of his vendor's fraudulent intent or of plaintiff's title need not be shown in such a case, it being sufficient to show that he had knowledge which should have put him upon inquiry and that such inquiry would have led to discovery of the facts.**

APPEAL from a judgment of the circuit court for Trempealeau county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

This is an action for the conversion of a weekly newspaper printing plant at Osseo, Wisconsin, consisting of type, presses, a typesetting machine, etc., alleged to be worth $3,000. The property was sold and possession thereof delivered April 27, 1911, by the plaintiff to one Carpenter, and a conditional contract of sale executed, by the terms of which plaintiff agreed to transfer the property by bill of sale to Carpenter or his assigns upon payment of $3,500 as follows: $500 down, and $500 on the 1st of January of each year, beginning with 1912, until the full sum of $3,500 was paid; and in case of default in any payment the contract was to be deemed terminated and the plaintiff to have the right of immediate possession of the property. This contract was never filed with the

village clerk, as required by sec. 2317, Stats. Carpenter made the cash payment of $500, and paid $120 interest January 4, 1912, but made no further payments. On the 27th day of January, 1912, Carpenter sold the property to the defendant *Matchett* for $1,500, of which $500 was paid down and two notes given for the balance. *Matchett* took possession on the same day and claims to own the same.

The jury, by special verdict, found as facts (1) that the sale from Carpenter to *Matchett* was made with intent on Carpenter's part to hinder, delay, and defraud the plaintiff; (2) that *Matchett* had notice of such intent when he purchased; (3) that *Matchett* had notice of the plaintiff's contract when he purchased; (4) that the reasonable value of the property January 27, 1912, was $2,100. The circuit court ordered a new trial unless the plaintiff remitted all damages in excess of $1,750. Such remission having been made, judgment for that sum and costs was rendered, and the defendant appeals.

S. G. Gilman, for the appellant.

For the respondent there was a brief by *Linderman & Jedney,* and oral argument by *G. O. Linderman.*

WINSLOW, C. J. The plaintiff claimed that *Matchett,* at the time of his purchase, had notice of the existence of the contract reserving title in the plaintiff, and also claimed that Carpenter's purpose in making the sale to *Matchett* was to defraud the plaintiff, and that *Matchett* had knowledge of such purpose. In either case the defendant's title to the goods was invalid as to the plaintiff. Secs. 2317, 2320, Stats.

The jury found that both claims had been established by the evidence. If these results were reached without prejudicial error the judgment must stand. We have found no such errors. It is claimed that it was error to receive evidence of certain statements made by Carpenter before the transfer to *Matchett* which tended to prove a fraudulent in-

tent on Carpenter's part but which were not made in the presence of *Matchett*. These statements were admitted by the trial court solely for the purpose of proving Carpenter's fraudulent intent, and the ruling was clearly right. It was necessary to prove both that Carpenter intended to defraud, and that *Matchett* knew of that intent, or knew facts which should have put him on inquiry and would have led him to knowledge of such intent. It may not be possible to prove both facts by the same evidence, but that does not render inadmissible evidence which tends to prove but one of them, especially where, as here, the jury are told the sole purpose for which the testimony is admitted.

It is said that the findings that *Matchett* had notice of the existence of the plaintiff's contract and of the fraudulent intent of Carpenter are unsupported by the evidence. It is true that there was no direct proof of such notice or knowledge, but there was considerable evidence showing that the transaction was quite extraordinary in its features. Carpenter met *Matchett* on the street at about 4 o'clock in the afternoon of January 26th, and asked him to buy the outfit. *Matchett* declined. That night *Matchett* examined the records in the office of the village clerk, and the next morning went to the printing office, looked the property over a few minutes, and offered $1,200 for the plant and $300 for the subscription list and accounts, without having any accurate knowledge of the value or amount of either. In two hours the offer was accepted, the $500 cash payment was rather ostentatiously made in the presence of a number of witnesses, and possession delivered, and before a complete list of property could be inserted in the bill of sale Carpenter signed it in its incomplete state and left town. *Matchett* was sixty-six years of age at the time and had never had active management of a newspaper before. It is not necessary to say that the evidence shows that he had any affirmative desire or intention to defraud anybody,—it is sufficient to say that the

extraordinary haste exhibited by Carpenter in the matter was entirely sufficient to put *Matchett* upon inquiry, and that such inquiry would unquestionably have led to discovery of the facts, for he was told by one of the witnesses to the bill of sale that the property probably did not belong to Carpenter.

There was sufficient evidence, therefore, to justify both the second and third findings of the jury. There is no claim of error in the charge, hence the judgment must be affirmed.

By the Court.—Judgment affirmed.

VERNON COUNTY BAR ASSOCIATION, Appellant, vs. MCKIBBIN, Respondent.

April 10—April 29, 1913.

Attorneys at law: Qualifications: Person improvidently admitted: Striking name from roll: Powers of court: Upon whose motion court may act: Statute construed: Practice in another state: Appeal, by whom taken: Bar association.

1. An attorney at law is an officer of the court; and the court has ample power to protect itself, the bar, and the public against the danger of any one holding such office who is not legally as well as morally qualified therefor.
2. In determining whether the name of a member of its bar should be stricken from the roll, the court may act upon its own motion or upon application of any member of such bar (and especially of the bar acting collectively) or even of a private person. The technical status of an *amicus curiæ* has nothing to do with the matter.
3. The mere lapse of the term at which a person was admitted to the bar does not disable the court from revoking his license to practice on the ground that he was not legally entitled to be so admitted.
4. Where the legislature has prescribed conditions of eligibility to admission to practice law, which are reasonable, it is the duty of the court to enforce compliance therewith.
5. Under a statute (sec. 1, ch. 19, Laws of 1903) providing that residents of this state who "have been admitted to practice in

the supreme court of any other state or territory" and who have actually practiced "in such other state or territory" for at least two years may be admitted to practice in this state, a person who after being admitted to practice in the supreme court of one state did not practice in that state but did practice for two years in another state by virtue of admission in a lower court in the latter state, was not entitled, when he became a resident of this state, to be admitted to practice here.

6. In admitting a person to practice upon proofs which show that he has not complied with the statutory conditions, the court commits a jurisdictional error which may be corrected at any time by expunging his name from the roll of attorneys.

7. A bar association which petitioned the circuit court to revoke an attorney's license to practice, being competent to be heard on such petition, is entitled to appeal to the supreme court from an order denying it.

APPEAL from an order of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Reversed.*

Special proceeding to recall a license issued to *George W. McKibbin* to practice law.

The *Bar Association of Vernon County* petitioned for an order to show cause why the license, which was granted some two years before by the circuit court for La Crosse county, should not be revoked because such license was granted upon proof, only, that *Mr. McKibbin* had practiced law for two years in West Virginia, under a license duly issued to do so, but not by its highest court. The order was granted. *Mr. McKibbin* answered, alleging that, prior to the admission in La Crosse county, he was duly licensed to practice law in West Virginia and practiced therein from November 13, 1907, to April 27, 1910, supporting that by a certificate showing admission to the bar of the circuit court for Randolph county, West Virginia. He further answered that, in due course, he graduated from the law department of U. S. Grant University in the state of Tennessee, and, thereafter, was duly admitted to the bar by the supreme court of that state and, subsequently, had two years' practice in the state of West Virginia, and that the admission in La Crosse county

was granted upon the circuit judge being satisfied by proofs of such facts.

The facts stated being conceded, the court held that the practice in West Virginia as a member of the bar of a circuit court to which he was admitted on proof of his having graduated at the law school in Tennessee and been admitted to practice law by the supreme court of that state, substantially, though not technically, satisfied the statute here as to competency for admission to the bar. Moreover, that the petitioner was without capacity to question respondent's right to enjoy his license, and that the court's jurisdiction to recall it lapsed with the term at which it was granted. Basing the result thereon the petition was dismissed.

For the appellant there was a brief by *C. W. Graves* and *H. P. Proctor,* president and secretary of the bar association, and oral argument by *Mr. Graves.*

For the respondent there was a brief by *W. F. & A. C. Wolfe,* and oral argument by *W. F. Wolfe.*

MARSHALL, J. A few general principles which need but to be stated to be recognized as sound and be appreciated, will disclose whether the learned circuit court decided rightly.

An attorney is an officer of the court and, in a sense, of the state. The position is one of much dignity and responsibility. It is very important to the people and the court that the standard of admission to the place and retention thereof should be as high as practicable in law, and maintained as high as practicable in fact. Much power in that regard is vested in the court by the constitution, incidental to its possession of judicial power and its duty to enforce, through careful administration, legislative tests of eligibility.

It has been aptly said by this court, that a bar is as essential, almost, as the bench and a good bar is essential to a good bench and a good bench to a good bar. *In re Goodell,* 39 Wis. 232. To that end it is recognized, in general, that the position of attorney is "subject to strict oversight

and summary power of the court,"—*In re Mosness,* 39 Wis. 509,—within the limits of reasonable legislative regulation, and that of judicial discretion where there is no written law on the subject. While using due caution to avoid doing injustice to any one who holds, even *de facto,* the position of member of the bar, the court should firmly perform its high judicial duty to protect itself, its bar, and the public from the danger of any one holding the high and honorable position of attorney at law who is not legally as well as morally qualified therefor. To that end the court has ample power, which may be exercised quite summarily, the boundaries of due process of law not being transcended, as the decisions of this court referred to, bear witness. They are in harmony with the general trend of authority. *Petition of Splane,* 123 Pa. St. 527, 16 Atl. 481; *In re Day,* 181 Ill. 73, 54 N. E. 646; *People ex rel. Blackmer v. Campbell,* 26 Colo. 481; *In re Cooper,* 22 N. Y. 67; *In re Branch,* 70 N. J. Law, 537, 57 Atl. 431; Weeks, Attorneys at Law, § 80; 4 Cyc. 900.

From the very nature of the judicial duty mentioned, no particular method is necessary to its activity. The court can act upon its own motion as to whether the name of a member of its bar should be stricken from the roll or on application of any member of such bar, or even a private person. Whenever a state of facts shall have come properly to its attention, requiring exercise of the power, it may and ought to act in the matter, making its own rules for the case where there is no written regulation on the subject, being careful to accord to the subject due process of law.

True, the court has some discretion as to whom to recognize. But the mere source is not jurisdictional, while arbitrary refusal to listen to information from a proper person might be jurisdictional. The idea entertained below, that the technical status of an *amicus curiæ* has anything to do with the matter, or that the collective bar, through its organic representatives, is not entitled to efficiently approach

the court with such a matter, cannot be approved. It would be a most radical departure from the idea before expressed, of the close relations between bench and bar, the mutual dependence of each upon the other, and importance to both of maintaining the highest practicable dignity, purity, capability, and integrity of the bar, to hold that, though the attorneys of a court petition it, acting substantially as a unit, as regards a matter vital to the integrity of the profession, a deaf ear must, or may, be turned thereto. There was a most grievous misconception at this point in the court below.

While the action of the court in admitting a person to be a member of its bar, or striking the name of a member from the roll for any cause, is of a judicial nature and within the appeal statute, the constitutional authority of the court in such matter is not limited, as in proceedings *inter partes,* so that the mere lapse of a term will disable it from doing whatever may be reasonably necessary to preserve the proper character of its officers. Some authorities to the contrary elsewhere are out of the general current on the subject, and to the foundation principles respecting the relations between the court and its assistants in the administration of justice. We cannot approve of the idea which the court below entertained on this point.

It is unnecessary to discuss, or express an opinion, as to whether, prescribing the standard for admission to the bar, is a judicial or legislative function. The court has heretofore spoken on the subject and, whether right or wrong, is immaterial to this case. For myself, I indorse wholly what was said in *In re Mosness,* 39 Wis. 509. It will be found, in my judgment, fully vindicated in the several cases above cited and, in general, by all considerate discussion of the subject.

There is no question but that the legislature has power to regulate admission to the bar by prescribing a standard therefor, and it is the duty, as it should be the pleasure, of the court to give full effect to all reasonable efforts in that re-

gard. Further, in case of the legislature having, as here, prescribed conditions of eligibility to admission to practice law, which are reasonable, want of such conditions should be regarded as insurmountable.

The legislature having reasonably provided by the written law, that "all persons who shall have been admitted to practice in the supreme court of any other state or territory, and who shall be residents of this state, may be admitted to practice" here "upon satisfactory proof of their having been engaged in actual practice in such other state or territory for a period of at least two years prior to application for admission to courts of record of this state," it cannot be departed from in judicial discretion, as was done in this case in refusing to recall the mistake made in the first instance. The only way that one can satisfy that standard of admission is to come up to it.

It follows that the learned circuit court committed error in treating a vital requisite of admission to the bar as a mere technicality. Instead of the subject having practiced his profession two years in the state where he was admitted to practice by its highest court, as our statute requires, he had not practiced there at all. It may be that the two years' practice in the neighboring state might mean as much, in fact, but it is not given to the courts to thus deal with a plain statutory regulation.

Therefore, the trial court committed jurisdictional error in admitting respondent. The competency of the court was limited by the proofs presented respecting whether the applicant for admission satisfied the statutory conditions. It granted the license in the face of a plain case of want thereof. Such an excess of authority may be recalled at any time. Doubtless the particular excess was not intentional. Any member of the bar, and especially the bar, acting collectively, has the right to request the court to recall such an inadvertent act and expunge from the roll of attorneys the name illegally placed there. Courts elsewhere have dealt with analogous

matters in a similar way. *Petition of Splane,* 123 Pa. St. 527, 16 Atl. 481, is a good example.

The result is unfortunate to the respondent, but the law cannot be changed to satisfy the necessities of a particular case. Doubtless he presented his application for admission in good faith and it was inadvertently granted; the trial court overlooking the want of essentials at the time, or not appreciating that it had no power to disregard them. No moral turpitude attaches to the respondent. He can probably regain his position through the abundant facilities afforded by the written law. It is far better that he should be put to that inconvenience than that a dangerous precedent should be made.

It is needless, perhaps, to say that, since appellant had sufficient interest in the subject of the litigation to possess competency to be heard on the petition in the court below, it is a party aggrieved by the order appealed from within the meaning of the appeal statute, and so, entitled to bring such order to this court for review.

By the Court.—The order is reversed, and the cause remanded with directions to grant the prayer of the petitioner.

CHAPMAN, Appellant, vs. PIECHOWSKI, Respondent.

April 10—April 29, 1913.

Master and servant: Injury from unguarded machinery: Statute construed: "Place where labor is performed."

Sec. 1636*j*, Stats., was intended to protect the health and safety of employees in factories, workshops, and manufacturing establishments; and the phrases "or other place where labor is performed" and "every place where persons are employed to perform labor" were intended to embrace places of the same general character as those enumerated. Such phrases do not include a threshing machine as a "place," within the meaning of the statute. MARSHALL and BARNES, JJ., dissent.

APPEAL from a judgment of the circuit court for Waushara county: BYRON B. PARK, Circuit Judge. *Affirmed.*

The plaintiff brings this action to recover damages for injuries he received while in the defendant's employ doing work as an attendant about the defendant's threshing machine.

At the time of the injury the plaintiff was twenty-two years of age. He had lived and worked on the farm from youth and had worked about threshing-machine outfits as a common laborer. In July, 1911, the defendant employed him as a member of his threshing crew, doing work as he directed, such as hauling water, tending the blower, and oiling and greasing the machine.

The defendant prior to the date of the accident had for years owned a threshing-machine outfit which he operated in Waushara county and other places. During the season of 1911 he had purchased a new machine and had provided it with an old style self-feeder. This new machine had attached to it a conveyor spout through which the partly threshed grain was conveyed from the rear of the machine and emptied into the cylinder chamber at a point directly over the revolving cylinders so as to rethresh it. The use of the old feeder attachment required a change from the original opening, and the defendant cut an opening in the center of the cover over the cylinders about ten inches square. There were no guards placed about this opening.

On the 1st day of August, 1911, while the defendant was operating the machine and plaintiff was engaged about the same in performing his duties, he was directed by the defendant to make some repairs on the machine which required him to stand on top of the cover near this opening. When he started for this place the machine was not running. After the plaintiff had made the repairs the defendant requested him to remove a grease cup from the machine and give it to the defendant, who took it to the engine and filled it with oil. While there the engineer started the machine. When the defendant returned to the machine he gave the plaintiff the

filled grease cup and directed him to replace it. Plaintiff took the cup from the defendant and stepped over the hole to the other side of the machine. It appears that plaintiff, in order to replace this cup, knelt down on the cover above the revolving cylinders, with his feet in close proximity to the hole in question, and that while there in this position and so engaged his knee slipped, causing his foot to move and come in contact with the revolving cylinder, mangling, cutting, and bruising it in such a manner as seriously to injure it. The plaintiff alleges that the defendant negligently failed to securely guard the opening over the revolving cylinder and that while plaintiff was exercising ordinary care he came in contact with the revolving cylinder, resulting in the injury complained of.

At the conclusion of the evidence the court, upon defendant's motion, directed a judgment of nonsuit in his favor. This is an appeal from such judgment.

For the appellant there was a brief by *James L. Kelley* and *Bouck & Hilton,* and oral argument by *Mr. Kelley* and *Mr. John F. Kluwin.*

For the respondent there was a brief by *E. F. Kileen,* attorney, and *J. C. Thompson,* of counsel, and oral argument by *Mr. Thompson.*

SIEBECKER, J. The trial court held as a matter of law that a threshing machine with a steam-driven revolving cylinder with steel teeth did not constitute a "place of employment" to perform labor within the meaning of the provisions of sec. 1636*j*, Stats. The original statute forming a part of this section is ch. 549, Laws of 1887, entitled "An act to regulate factories, workshops and other places of employment." Sec. 1 thereof regulated the number of persons that might be employed in any ". . . such factory, workshop or other place of employment," to be determined by the board of health. Sec. 2 provided that stationary vats, pans, etc., were to be surrounded with proper safeguards, and that:

"All belting, shafting, gearing, hoists, fly-wheels, elevators and drums of manufacturing establishments so located as to be dangerous to employees when engaged in their ordinary duties shall be securely guarded or fenced so as to be safe to persons employed in any such place of employment."

Sec. 3 prescribed penalties for failure to comply with the provisions of the act and provided, ". . . every day's failure after the first conviction shall constitute a separate offense, after due notice by the state factory inspector." This was amended in the revision of 1898 by changing the phraseology thereof; but the amendments did not affect the substance of the provisions as they existed, nor do the amendments indicate an intent to extend the provisions to include places of employment other than such places as were embraced in the existing statute. This is plainly indicated by the context of the law and the part prescribing the penalties for its violation. As to the last feature it was enacted:

"Any person or corporation which shall neglect for thirty days after the receipt of written notice from the state factory inspector to provide a suitable place for the persons employed by him to work in or who shall fail to make and maintain such safeguards as this section requires and as said inspector shall specify, . . ." shall forfeit the specified amount for each offense.

The provisions of sec. 1636*jj* do not enlarge the scope of the provisions of the preceding section. This point was urged upon the court in the case of *Schmitt v. Seefeld,* 139 Wis. 459, 121 N. W. 136, and it was there held that sec. 1636*jj* does not modify the preceding one so as to enlarge its scope or meaning, and that this section refers only to such machinery as the preceding one embraces.

From a consideration of the statutes in all their parts, in the light of the manifest object of the regulation of places specifically enumerated therein and the duties imposed in relation thereto on boards of health and the factory inspector to secure effective enforcement of the statutes, it is apparent that the legislative intent was to protect the health and safety of

employees employed in factories, workshops, and manufacturing establishments, and that the phrases in the statutes "or other place where labor is performed" and "every place where persons are employed to perform labor," in the connection they are used, were intended to embrace places of the same general character as those enumerated, and that the word "place" following the particular words describing the subjects to which the regulation is applied was not intended to extend to all places whatsoever where persons are employed to perform labor. The whole context of the statute suggests that the legislature thought of particular classes of places where employees are surrounded by conditions such as are described, namely, places which to some extent inclose the machinery and the employees, and that it was not intended that the regulation should include all places without restriction as to surrounding conditions and environment. We are of the opinion that the phrases "or other place where labor is performed" and "every place where persons are employed to perform labor" in this statute were not intended to include a threshing machine as a "place" within the meaning of this law. The plaintiff confessedly planted his rights to a recovery on these statutes and hence he has no case against the defendant.

By the Court.—The judgment appealed from is affirmed.

MARSHALL, J. (*dissenting*). I must dissent from the conclusion as to the meaning of sec. 1636*j* of the Statutes. In the light of modern needs and thought, legislative efforts to vitalize the same by written law and the judicial duty, all feel, to give literal effect to legislative language to that end,—in the absence of manifest ambiguity and that a reading along restrictive lines will most likely respond to the wishes of the lawmakers,—why should courts survey an enactment from a viewpoint, disclosing to the judicial vision obscurity, when from a different point of sight there is none, and then apply the rules for construction affording an easy pathway to

a restrictive result? It was thought that *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179, and *Kosidowski v. Milwaukee,* 152 Wis. 223, 139 N. W. 189, marked a termination of the rather free use of such rules to discover the legislative purpose in remedial acts of the nature of the one in question.

The legislature,—where the responsibility for changing the common rules seeming to be unsuitable to modern conditions was lodged by the people in the written constitution,—either through want of knowledge of its power or want of appreciation of the necessity for use of it for more than half a century, so tardily responded to the demands of the times that it is not to be wondered at that the court dealt with the early efforts in that regard with such conservatism that ambiguity was seen, often, where it would not be now observed, and then by use of the rule, good in its place, that an act in derogation of the common law, if open to two or more meanings, should be construed most strongly against change and, also, by use of those instrumentalities, valuable in their places, *noscitur a sociis* and *ejusdem generis,* as to render changes slow and difficult, largely because of a high appreciation of duty to effectuate the legislative purpose and not go beyond it. In this age of modern awakening, that conservatism has no proper place. Given place and activity, where reasonable necessity therefor does not exist, it tends to obstruct and give cast of unfriendliness or disposition to defeat when none exists in fact.

Modern progressivism in deed as well as in thought, is the demand of the times and the general order of the day. Judicial appreciation of that was vindicated in the cases to which I have referred, both of which I had the honor to write for the court. It was thought then that a new point of sight had been firmly established, necessary to a proper conception of the legislative purpose in its recent efforts of the character of the one under consideration,—a point of sight casting the whole responsibility for common-law infractions, within con-

stitutional limitations, on the lawmaking power where it belongs. It is not improbable that laws have been passed without that intelligent consideration which should be devoted to such matters, and that unanimity as to the meaning of the enactments, depending upon the court to minimize the changes, resulting in the creation of more or less prejudice against the judiciary, which is undeserved and might, perhaps, have been largely avoided by holding up the lawmaking power as speaking along broad instead of narrow lines where the former would appear from the literal sense of words.

It seems to me that the logic of the recent cases requires the court to give literal effect to the words "every place where persons are employed to perform labor" in the act in question. Why regard them as ambiguous at all? Why wrestle with the rules for construction, particularly the rule of *ejusdem generis,* to restrict the natural ordinary meaning of the words? That is a rule of necessity. If there be any contingency of that sort in this case, does it not seem to be quite artificial? If the legislature did not intend the broad meaning, which in commonplace affairs would be applied to the words, how easy it was to have made that manifest. Giving such literal effect, there is no absurdity in the enactment. It is perfectly reasonable, looking along the lines of similar legislation, as indicated in the opinion of my brother BARNES. Why not hold the legislature responsible for having intended just what they said and, if the result would seem to throw a rather too harsh a burden upon employers, let the finger of public criticism point to the proper source of the mischief?

I must adhere, firmly, to the logic of the *Koepp Case* and the *Kosidowski Case.* I believe my brethren are, in general, in accord therewith, but do not appreciate the inconsistency, which seems clear to me, in refusing to see an intent, through the vista of *ejusdem generis* to use words restrictively in the one case and see such intent clearly in the other, though the general purpose of the two enactments is the same.

BARNES, J. (*dissenting*). The origin of sec. 1636*j*, Stats. (1911), was ch. 549, Laws of 1887. That act covered several distinct subjects. Sec. 1 of the law forbade overcrowding of employees in *"any factory, workshop or other place of employment."* Sec. 2 of the act related to two distinct subjects and read as follows:

"Every stationary vat, pan or other structure with molten metal or hot liquids shall be surrounded with proper safeguards for preventing accidents or injury to those employed at or near them. All belting, shafting, gearing, hoists, flywheels, elevators and drums *of manufacturing establishments* so located as to be dangerous to employees when engaged in their ordinary duties shall be securely guarded or fenced so as to be safe to persons employed in any such place of employment."

Sec. 3 provided a penalty for noncompliance with the act. This law was carried into the Annotated Statutes of 1889 as sec. 1636*f*, and was revised and amended by the Statutes of 1898, where it appears as sec. 1636*j*.

In the revision of 1898 the first section was enlarged by defining the powers of the local boards of health. The second section was embodied in a single sentence. The provision respecting the guarding of receptacles for molten metals was not changed, while a material alteration was made in the one relating to the guarding of dangerous machinery. This alteration consisted of dropping the words *"of manufacturing establishments"* from the revision; so that while the original act provided for the guarding of shafting and gearing in manufacturing plants only, the law of 1898 required that all such machinery should be securely guarded wherever located. At least, such seems to me to be the plain meaning of the statute. It reads:

"The owner or manager *of every place where persons are employed* to perform labor shall surround every stationary vat . . . into which molten or hot liquids are poured or kept with proper safeguards . . . , and all belting, shafting,

gearing, hoists, fly-wheels, elevators and drums therein which are so located as to be dangerous to employees in the discharge of their duty shall be securely guarded or fenced."

It will be observed that while the original act required dangerous machinery to be guarded in manufacturing establishments only, the revision of 1898 required it to be guarded in *"every place" where found.*

It seems to me to be quite an exhibition of temerity or main strength to say that the words *"manufacturing establishments"* and the words "every place" are synonymous. We cannot impute to the legislature the purpose of changing the wording of the original act to mere wantonness, especially where the change is so radical in character. The purpose of the change was manifest and obvious. The idea of protecting employees from dangerous machinery developed gradually. During the eleven years that elapsed between the enactment of the two statutes it was discovered that it was just as serious a matter to lose an arm or a leg in a gearing outside of a factory as inside it, and that it was just as easy to prevent the injury in the one place as in the other, and that the fact that the injury occurred outside of a factory instead of inside afforded little consolation to the injured party and no compensation. It is obvious that the legislature awoke to the fact that justice demanded that all employees should be protected against dangerous machinery, and that there was no logical reason why pariahs should be made of one class of employers and pets of another.

As against manufacturers, sec. 1636*j* has been pretty rigorously enforced. In doubtful cases the court has, I think, been inclined to lean in favor of the employee rather than the employer. I cannot consent to any narrow construction of it when we are called upon to determine what employers are subject to its terms and what are excluded. My own view is that the construction here adopted is both narrow and illogical. When we first have a statute requiring dangerous machinery to be guarded in a factory or workshop and it is

subsequently amended so as to require such machinery to be guarded in *any place* and making no special reference to factories, I cannot think that the two statutes mean the same thing.

The entire state is interested in reducing the number of our cripples to a minimum. Loss of earning power in the individual is a loss to the community at large. It is often a direct burden, because the unfortunate and his family, if he has one, must be supported at public expense. Then there is the less selfish, the broader and more humanitarian consideration, to wit, the prevention of pain, suffering, mortification, and loss of ability to earn a livelihood in the unfortunates who become maimed and disabled through preventable causes. There is no more reason why an employee around the cylinder of a threshing machine should not be protected, where concededly protection could easily be afforded, than an employee around a piece of machinery no more dangerous when located in a factory. The loss in case of injury is just as great, the moral duty on the part of the employer to safeguard the employee is just as great, and I think the legal duty under a fair construction of the statute is just as great. How can it be said that, where a man is employed to oil and grease a threshing machine and put on belts and look after the machinery therein, the machine, and the ground or floor on and around where it stands, is not a *"place where persons are employed"*? The ratiocination by which the court reached the conclusion, as it necessarily did (in *Herning v. Holt L. Co., ante,* p. 101, 140 N. W. 1102), that a steam engine temporarily set up out in the woods to load logs on cars, and the support on which it rested, was a *"place"* of employment while a threshing machine temporarily set up to thresh grain, and its immediate surroundings, is not, does not appeal to me. It savors of class distinction where none was intended, of throwing the protecting arms of the court around a numerous class of employers to which the legislature did not intend to extend immunity. In this connection I desire to

refer to still another of our late decisions. Sec. 1636—81 provides that a person employing another in labor of any kind in the "erection, repairing, altering or painting of any house, building or *structure*" shall not furnish unsafe scaffolding, hoists, etc. Under this statute we held a city liable that was engaged in replacing water mains, because the employee was working on a *"structure,"* within the meaning of the statute. *Kosidowski v. Milwaukee,* 152 Wis. 223, 139 N. W. 189. So it is now judicially determined that a person working around a threshing machine *is not* working at a "place," while a man engaged in lowering water pipes into a trench *is* working on a *"structure."* In another case decided at the same time (*Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179), it was held that where an employee was directed to build a scaffold and wash down the ceiling so that it could be painted, the plaintiff while washing the ceiling was employed in *"painting,"* within the meaning of that word as used in sec. 1636—81, although the employee was not a painter and there was nothing to show that it was intended that he should do any painting.

The opinion proceeds upon the theory that the word "place," where used in the provision relating to guarding machinery, has the same meaning that the word has when used in the part of the statute which prevents overcrowding in "any factory, workshop or other place" where labor is performed, and that the words "other place" as there used mean a place like unto or akin to a factory or workship. In construing the kindred statute, sec. 1636—81, the precise contention which we have before us was made. It was claimed that the words "mechanical contrivances" in the phrase "scaffolding, hoists, stays, ladders or other mechanical contrivances" meant something akin to "scaffolding, hoists, stays or ladders." The claim was rejected. It was said, after discussing the purpose which the legislature had in mind in passing the statute, "that the rule of *ejusdem generis* does

not apply to restrict the meaning of any of the descriptive words in the law." Continuing the court said:

"So the word 'repairing' stands by itself, in practical effect. It is not to be restricted by anything which precedes it or follows it. The same is true of the term 'scaffolding' and the words 'mechanical contrivance.' Each is to be given the broad comprehensive meaning necessary to accomplish the manifest purpose of the act. Both the work and the structure or contrivance may be as well inside a building as outside and the particular distance above the floor or ground is not material so long as the work and the contrivance answer fully to the calls of the law." *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 320, 139 N. W. 179, 186.

So I reject the construction placed on the statute by the court, for two reasons. The provision of sec. 1636*j* dealing with overcrowding in factories, workshops, and places of employment is separate and distinct from the one which requires the owner and manager of every place to securely guard dangerous machinery. The words "building or workshop" are not used in connection with the safeguarding of machinery and should not be read into this part of the statute. If they are in or are read in, then the rule of *ejusdem generis* should not be applied to the words "other place," where they follow the words "factory" and "workshop," under the rule of the *Koepp Case*. Before concluding this branch of the discussion I desire to refer to the case of *Hermann v. Port Blakely M. Co.* 71 Fed. 853, 856, wherein it is held that the word "place," as used in the rule that a master must provide a safe place for his servants in the performance of their duties, means *"the premises where the work is being done."*

It is suggested that the final provision of sec. 1636*j*, as it appears in the Statutes of 1898, in some way restricts the meaning of what precedes it. It reads as follows:

"Any person or corporation which shall neglect for thirty days after the receipt of written notice from the state fac-

tory inspector to provide a suitable place for the persons employed by him to work in or who shall fail to make and maintain such safeguards as this section requires and as said inspector shall specify, shall forfeit not to exceed twenty-five dollars for each offense, and every day's neglect or failure, after a conviction hereunder, shall constitute a separate offense."

I do not conceive that this provision limits or restricts the meaning of the one which precedes it. It deals not with liability or even duty to employees, but provides a penalty for failure to do certain things. I observe no reason why the owners of threshing machines are not amenable to the notice provided for as well as other operators of dangerous machinery. If the power to inspect such a machine is not otherwise expresaly provided for by statute, it is here conferred by plain implication. The power of factory inspectors is by no means confined to factories. It extends to elevators and fire-escapes in public or semi-public buildings and to many other things. Secs. 1021*e* to 1021*h*, Stats. (1898). They may order "bull-wheels, fly-wheels, tumbling-rods, elevator wells, stairways, shafting or dangerous machinery of any kind to be inclosed or otherwise guarded so as to protect workmen or others." Sec. 1021*h*, Stats. (1898). Their duties in this regard are not confined to factories. Tumbling-rods are things which the writer has rarely heard of except in connection with the old horse-power threshing machine.

Sec. 1636*j* was amended and rewritten in 1911, but no change was made therein which affects the present case. Ch. 470, Laws of 1911.

BAKER and another, Appellants, vs. BECKER and another, Respondents.

April 10—April 29, 1913.

Trial: Special verdict: Answers, when changed or disregarded: Sales: Corporate stock: False representations: Right to rely thereon: Rescission: Placing vendor in statu quo: *Waiver: Judgment:* Res judicata: *Costs: Action on contract: Equitable counterclaim.*

1. The trial court may properly change or disregard answers in a special verdict which, by the other answers and the evidence, are shown to be erroneous as a matter of law.
2. Representations made by the vendor of stock in a creamery company, to induce its purchase, as to the amount of business done at the creamery, the competition in that locality, and the price received for manufacturing butter, do not relate to matters obvious upon inspection or equally open to both parties, but are such as a purchaser, although he may have visited and inspected the plant pending the negotiations, has a right to rely upon.
3. The purchaser of stock in a creamery company having made timely demand for rescission on the ground of fraud, the fact that the creamery was afterwards burned and that the wagons and milk cans were then sold does not defeat his right to enforce rescission in equity, on the ground that he cannot tender back all that he received or place his vendor *in statu quo*, where the money received for said equipment and the insurance money are held for such vendor either in the treasury of the company or by the clerk of the court.
4. A payment made by a purchaser of property upon the purchase price, before he has full information respecting the falsity of representations upon which he relied in making the purchase, will not constitute a waiver of his right to rescind.
5. If in two actions between the same parties the issues involved are the same, a determination of such issues in one action will be *res judicata* in the other.
6. Where the complaint states a cause of action at law upon contract the costs, exclusive of disbursements, are limited by sec. 2921, Stats., to $25, although the answer interposes an equitable counterclaim which becomes the principal subject of litigation.

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Modified and affirmed.*

Action to recover on promissory note given in part payment of the purchase of a creamery. The defendants set up two counterclaims, one for the recovery of damages, and the other an equitable counterclaim setting forth alleged false and fraudulent representations made by the plaintiffs which induced the defendants to purchase the creamery and asking for rescission. The answer of *August E. Becker* alleges that after discovery of the fraud he demanded the return of his money and notes given as consideration for the purchase price, which demand was refused. Defendants pray judgment that they recover $250 with interest, and that the agreements for the purchase of the creamery be rescinded and the notes given by defendant *August E. Becker* be canceled and that plaintiffs be adjudged to secure and indemnify defendant *August E. Becker* from loss, and that the plaintiffs be adjudged to accept a reconveyance of the stock purchased by defendant *August E. Becker* and for the recovery of $575, and for such other and further relief as may be just and equitable. The defendant *John Becker* put in an answer asking that the complaint be dismissed and for general relief. There was a reply to the counterclaims denying generally the allegations thereof.

It was stipulated that in case of recovery by defendants the defendant *August E. Becker* should recover on his first counterclaim $250 and on his second $560.

The jury returned the following verdict:

"(1) Did the plaintiff *Wheeler* knowingly make false representations to the defendant *August E. Becker* as to the amount of business done by the Royalton Creamery Association? *A.* Yes.

"(2) If you answer question 1 'Yes,' then did the defendant *August E. Becker* rely upon said representations in making the purchase of said stock? *A.* Yes.

"(3) If you answer question 2 'Yes,' then did the defendant *Becker* have a right to rely upon such representations? *A.* No.

"(4) Did the plaintiff *Wheeler* knowingly make false representations to the defendant *Becker* as to competition at the Royalton Creamery? *A.* Yes.

"(5) If you answer question 4 'Yes,' then did the defendant *Becker* rely upon said representations in making the purchase of said stock? *A.* Yes.

"(6) If you answer question 5 'Yes,' then did the defendant *Becker* have a right to rely upon such representations? *A.* No.

"(7) Did the plaintiff *Wheeler* knowingly make false representations to the defendant *August Becker* as to the condition of the machinery in said creamery? *A.* No.

"(8) If you answer question 7 'Yes,' then did the defendant *Becker* rely upon said representations in making the purchase of said stock? *A.* ——.

"(9) If you answer question 8 'Yes,' then did the defendant *Becker* have a right to rely upon such representations? *A.* ——.

"(10) Did the plaintiff *Wheeler* knowingly make false representations to the defendant *Becker* as to the sum the Royalton Creamery Association was receiving per pound for making butter? *A.* Yes.

"(11) If you answer question 10 'Yes,' then did the defendant *Becker* rely upon said representations in making the purchase of said stock? *A.* Yes.

"(12) If you answer question 11 'Yes,' then did the defendant *Becker* have a right to rely upon such representations? *A.* No."

Both parties moved for judgment on the verdict. The defendants moved that the answers to the third, sixth, and twelfth questions be changed from "No" to "Yes," or that said answers to questions number 3, 6, and 12 be stricken out. The court treated the verdict as advisory and made the following findings:

That the plaintiffs, *George A. Baker* and *H. A. Wheeler,* were on the 6th day of December, 1910, and for some time prior thereto had been, the owners and holders of sixty-three shares out of a total of sixty-nine shares of stock of the Royalton Creamery Association, a domestic corporation located

at Royalton, Waupaca county, Wisconsin, and the par value of said stock was $50 per share, and the business that of manufacturing and selling butter and butter products; that the plaintiffs by reason of their ownership of said shares had a controlling interest in said creamery, and the plaintiff *H. A. Wheeler* on the 6th day of December, 1910, and since the 1st day of February, 1909, was the butter-maker at said creamery and had supervision and control of the manufacture and sale of butter at said creamery, had charge of the books and accounts thereof, and was secretary and treasurer of said association.

That shortly prior to the 8th day of November, 1910, the plaintiffs, *George A. Baker* and *H. A. Wheeler,* corresponded with the defendant *August E. Becker* for the purpose of negotiating a sale of said sixty-three shares of stock, and on said date said defendant *August E. Becker,* at the request of plaintiffs, went to Royalton for the purpose of entering into negotiations for the purchase of said creamery by purchasing said stock, and on December 6, 1910, plaintiffs sold and transferred to *August E. Becker* said sixty-three shares of stock for $3,000, the defendant *August E. Becker* thereupon paying plaintiffs $50 in cash and giving his promissory note for the sum of $450 dated December 6, 1910, due December 20, 1910; note for $500 dated December 6, 1910, due April 1, 1911, which note was also signed by defendant *John Becker;* note for $500 dated December 6, 1910, due December 1, 1912; note for $500 dated December 6, 1910, due December 1, 1913,— all of which notes were payable at the First National Bank of New London, Wisconsin, to the order of *George A. Baker* and *H. A. Wheeler,* bearing interest at the rate of six per cent. per annum.

That at the time of the sale of said stock one C. J. Jensen, of Royalton, Wisconsin, held fifty shares of said stock as collateral security for a loan of $1,000 made by him to plaintiffs, which debt was evidenced by notes, and as part of the

purchase price paid by said *August E. Becker,* and for the remaining $1,000 thereof said *August E. Becker* gave to said C. J. Jensen, at the request of plaintiffs, ten promissory notes dated December 6, 1910, each in the sum of $100, with interest at six per cent., the first note being due two months after date and one of said notes being due at the end of each interval of two months thereafter, and to secure said notes gave said C. J. Jensen a chattel mortgage on sixty-three shares of stock of the Royalton Creamery Association; that in consideration of the giving of said notes and chattel mortgage to said Jensen said Jensen canceled and surrendered to plaintiffs their note of $1,000 which he held, and delivered to plaintiffs the fifty shares of stock held by him as collateral security for said loan, which shares were transferred by plaintiffs to defendant *August E. Becker* as part of the purchase of said stock.

That said defendant *August E. Becker* paid said plaintiffs December 6, 1910, on the purchase price of said creamery $50, and between the 6th and 21st of December, 1910, paid plaintiffs $200, making a total payment in cash of $250, which was applied on the note for $450; that in January, 1911, by an agreement between plaintiffs and defendant *August E. Becker,* said note for $450, on which $250 remained unpaid, was surrendered up and transferred to said *Becker* in consideration of $250 to be paid, but which payment was never made, for the recovery of which, together with other items, plaintiffs have brought a separate action which is now pending; that there remain unpaid and outstanding obligations in favor of plaintiffs and against defendant *August E. Becker* $250, balance due on said $450 note; said note of $500 dated December 6, 1910, due April 1, 1911; note of $500 dated December 6, 1910, due December 1, 1912; note of $500 dated December 6, 1910, due December 1, 1913, all of which notes are payable to the order of *George A. Baker* and *H. A. Wheeler,* and are negotiable notes

bearing interest at the rate of six per cent. per annum; and the further sum of $1,000 in the form of ten notes of $100 each, dated December 6, 1910, payable to C. J. Jensen, the first two months after date, and one each of said other notes at a period of two months thereafter, all notes being negotiable and bearing interest at six per cent. per annum; that the obligations outstanding and unpaid of the defendant *John Becker* consist only of the note for $500 dated December 6, 1910, due April 1, 1911, payable to *George A. Baker* and *H. A. Wheeler,* being the note upon which plaintiffs have brought this action; that the defendant *John Becker* is the father of defendant *August E. Becker* and signed the note for the accommodation of *August E. Becker,* and said *John Becker* received no consideration for said signature.

That the following statements and fraudulent representations were made by the plaintiff *H. A. Wheeler* to the defendant *August E. Becker* as set forth in defendants' answer and counterclaim, to wit: (a) That the said creamery was doing a flourishing and profitable business and making 180,000 pounds of butter a year. (b) That said creamery had 128 satisfied patrons. (c) That there was no competition in the dairy business except from one creamery located at Weyauwega, Wisconsin. (d) That there was only one creamery in that locality, and that was located at Weyauwega, a distance of seven miles from Royalton creamery. (e) That the plaintiff *Wheeler* was receiving three cents per pound from the patrons of the creamery for making the butter at said creamery. (f) That the boiler in said creamery was five years old and in good condition and the separator was three years old and in good condition.

That said statements were made by the plaintiff *H. A. Wheeler* to the defendant *Becker* on the 8th day of November, 1910, at which time said *Becker* visited Royalton for the purpose of negotiating for the purchase of said creamery, and on December 6, 1910, defendant completed the purchase of

said stock; that the plaintiff *George A. Baker* aided and assisted plaintiff *H. A. Wheeler* in making said sale, and said *Baker* received and partook of the benefits acquired by said plaintiffs by reason of said sale; that all of said representations were false and were made by the plaintiff *Wheeler* for the purpose of inducing the defendant *August E. Becker* to purchase the stock of said creamery association, and that the defendant *August E. Becker* believed said representations and statements and relied thereon in the purchase of said stock; that all of said representations and statements were of material facts; that the defendant *August E. Becker* had a right to rely upon all of said statements and representations except that statement in regard to the condition of the boiler and separator, and as to such representations the defendant *August E. Becker* had no right to rely thereon; that the facts and circumstances in regard to the representations and statements regarding the number of patrons and the state of competition, besides being false and untrue on November 8, 1910, were materially changed for the worse by December 6, 1910, said patronage materially less and said competition much greater December 6th than on November 8th, which decrease of patronage and increase of competition was brought about by conditions existing November 8th, known to plaintiffs and not known to defendants, and was largely, if not wholly, due to the Manawa condensing plant, which began operations about November 1st; and that said fact and the falsity of said statements were well known to the plaintiffs December 6th; that the defendant *August E. Becker* did not on December 6th know of any change in conditions and had no knowledge of facts to put him on inquiry as to any changed conditions, and relied and had a right to rely upon the information given by plaintiff *Wheeler* November 8th, all of which was well known to plaintiffs, but notwithstanding this they sold and transferred said shares of stock to said defendant without informing or making known to him the

change in condition of said business since said false representations were first made.

That said defendants after the purchase of said stock arranged with the plaintiff *Wheeler* to continue the running of said creamery until defendant *August E. Becker* could take actual charge thereof, and that defendant *August E. Becker* took actual charge December 20, 1910; that a meeting of the stockholders of said company was not held until January 12, 1911, and in the meantime plaintiff *Wheeler* refused and neglected until January 6, 1911, to deliver over or give said defendant *August E. Becker* the books of said creamery association or the books used in running the creamery; that in the latter part of December, 1910, and again about January 20, 1911, defendant *August E. Becker* demanded a rescission of this contract, agreeing to and tendering to said plaintiffs the consideration which he received in such contract and demanding the return of the notes and money paid by him to said plaintiffs, but that said plaintiffs utterly failed and refused so to do; that the plaintiffs are now the owners and holders of said promissory notes hereinbefore described, and the said C. J. Jensen the owner and holder of said ten promissory notes hereinbefore described.

That the defendant *August E. Becker* paid said plaintiffs on said notes $250 as follows: $50 December 6, 1910, $100 December 20, 1910, and $100 on or about December 16, 1910; that the defendant *August E. Becker* had incurred expense and suffered loss by reason of the purchase of said creamery under said false and fraudulent representations in the sum of $60 by reason of the expense of removal from his home in Denmark, Wisconsin, to Royalton, Wisconsin, and the further sum of $450 by reason of loss of time and wages, and the further sum of $50 by reason of incidental expenses incurred by him by reason of said fraudulent representations, amounting to $560, which said claims against the plaintiffs are stipulated to be correct and to be the amount recovered by said defendant, if he recovers in this action.

The court concluded that the facts alleged in the answer and counterclaim of the defendants and as proven on the trial invoke the relief of equity.

That the defendant *John Becker* was an accommodation maker of said note of $500 dated December 6, 1910, due April 1, 1911.

That the sale of sixty-three shares of stock by plaintiff to defendant *August E. Becker* was fraudulent.

That the defendants are entitled to a return and cancellation of said note of $500 dated December 6, 1910, due April 1, 1911, payable to *George A. Baker* and *H. A. Wheeler,* interest at six per cent.

That the defendant *August E. Becker* is entitled to a return and cancellation of the note for $500 dated December 6, 1910, due December 1, 1912, and the note for $500 dated December 6, 1910, due December 1, 1913, both of which were payable to plaintiffs.

That the plaintiffs are not entitled to recover from the defendant *August E. Becker* any part or portion of the sum of $250 which they credited said defendant on his note for $450 dated December 6, 1910, payable to plaintiffs December 20, 1910, and the defendants are entitled to a permanent injunction against plaintiffs restraining and forbidding them from negotiating or transferring said notes hereinbefore mentioned or any of them.

That the defendant *August E. Becker* is entitled to be protected and indemnified by the plaintiffs against any loss or damage by reason of said ten notes of $100 each, dated December 6, 1910, payable one at the end of two months and one each at the expiration of each two months thereafter, and is further entitled to have a lien upon said sixty-three shares of stock of the Royalton Creamery Association which were transferred to him by said plaintiffs, and to hold the same as security therefor until his said ten notes to said C. J. Jensen are canceled and returned to him.

That the defendant *August E. Becker* is entitled to recover

from said plaintiffs on his first counterclaim the sum of $250, with interest at six per cent. thereon from the 20th day of December, 1910, and on his second counterclaim the sum of $560, and is entitled to have a lien upon said sixty-three shares of stock and to hold the same as security for the payment of said sum of $250 with interest and said sum of $560.

That upon the return of said notes hereinbefore described said plaintiffs are entitled to a return and transfer by said defendant *August E. Becker* to said plaintiffs of said sixty-three shares of stock in the Royalton Creamery Association, subject, however, to a lien in favor of said *August E. Becker* and against said plaintiffs, to protect the said *August E. Becker* from loss or damage by reason of said ten notes of $100 each given to said C. J. Jensen, and subject further to the lien of said *August E. Becker* on said shares as security for the payment of the sums adjudged to said *August E. Becker* by reason of his first and second counterclaims, and that said *Becker* may retain said certificates of stock until said liens are satisfied.

That as to the defendants the plaintiffs take nothing on their complaint, and that the defendants are entitled to their costs and disbursements in this action.

Judgment was entered accordingly, from which the plaintiffs appealed.

For the appellants there was a brief by *Giles H. Putnam* and *Llewellyn Cole,* and oral argument by *Mr. Putnam.*

For the respondents there was a brief by *E. L. & E. E. Browne* and *Lloyd D. Smith,* and oral argument by *Mr. Smith.*

KERWIN, J. The facts in the case fully appear in the statement of case hereinbefore set out.

The court below as well as the jury found that the alleged representations were made and in the main relied upon by defendant, were false, and damaged the defendant. These

findings are well supported by the evidence notwithstanding they are vigorously assailed by counsel for appellants. True, the court disregarded the findings of the jury to the effect that the defendant did not have a right to rely upon the representations. In this regard the court was right. Upon the other findings and the evidence it was established as matter of law that the defendant did have a right to rely upon the representations, and therefore the court was justified in changing the answers to these questions or disregarding them.

Counsel for appellants, however, appear to rely with confidence upon the proposition that the defendant ought not to have been misled by the representations; that the representations were not such as a reasonably prudent man should have relied upon, the means of knowledge being equally open to both parties. We cannot agree with counsel in this contention. The material representations were not open and obvious, but on the contrary were such as might reasonably have been relied upon, as appears from the undisputed facts. True, if the representations were open and obvious and such as the defendant could have seen if he opened his eyes and looked, it is doubtless true that he could not claim that he had been deceived. But such is not the case before us. The falsity of the most material representations could have been discovered only by considerable time and research.

Appellants under this head rely upon *Prince v. Overholser,* 75 Wis. 646, 44 N. W. 775; *Warner v. Benjamin,* 89 Wis. 290, 62 N. W. 179; *Bostwick v. Mut. L. Ins. Co.* 116 Wis. 392, 89 N. W. 538, 92 N. W. 246; *Schauer v. Bodenheimer,* 150 Wis. 550, 137 N. W. 785; *Jacobsen v. Whitely,* 138 Wis. 434, 120 N. W. 285; *Northern S. Co. v. Wangard,* 117 Wis. 624, 94 N. W. 785; *Kaiser v. Nummerdor,* 120 Wis. 234, 97 N. W. 932; *Barndt v. Frederick,* 78 Wis. 1, 47 N. W. 6; *Bowe v. Gage,* 127 Wis. 245, 106 N. W. 1074; *Farr v. Peterson,* 91 Wis. 182, 64 N. W. 863. An examination of these cases will show that they are distinguishable from the instant

case. Reference to a few of them will illustrate their character.

In *Warner v. Benjamin, supra,* the representation was merely matter of opinion, not a representation of an existing fact or past event. In *Farr v. Peterson, supra,* the general rule was laid down to the effect that where means of knowledge are at hand and equally available to both parties and the subject matter of the purchase equally open to their inspection, if the purchaser does not avail himself of those means and opportunities he will not be heard to say, in impeachment of the contract of sale, that he was drawn into it by the vendor's misrepresentations. In *Bostwick v. Mut. L. Ins. Co., supra,* plaintiff agreed for a policy of insurance and received a different one, and upon receipt of the policy put it in a drawer without examination, although a casual glance at it and an accompanying letter would have disclosed that it was not the policy he expected. Several months afterwards, on discovery of the fact, plaintiff for the first time objected. Held, that the fraud, if any, was waived and the policy accepted.

Bowe v. Gage, supra, holds that it was not error to refuse to submit a question to the jury inquiring whether the misrepresentations were sufficient to influence the conduct of a person of ordinary intelligence; that there is no such issue in an action for deceit; that the sole question is whether the misrepresentations in fact deceived the party involved and materially affected his conduct.

Jacobsen v. Whitely, supra, holds that an action for deceit cannot be maintained by one who acted blindly upon statements whose falsity he knew or by the exercise of ordinary observation would have known.

The instant case is ruled by *Miner v. Medbury,* 6 Wis. 295; *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406; *Lee v. Burnham,* 82 Wis. 209, 52 N. W. 255; *Cotzhausen v. Simon,* 47 Wis. 103, 1 N. W. 473; *Davis v. Nuzum,* 72 Wis.

439, 40 N. W. 497; *Woteshek v. Neuman,* 151 Wis. 365, 138 N. W. 1000; *Brown v. Ocean A. & G. Corp., ante,* p. 196, 139 N. W. 1112; *Beetle v. Anderson,* 98 Wis. 5, 73 N. W. 560; and other cases in this court.

Appellants concede that a defrauded purchaser has two remedies: one to rescind, tender back all he has received, and recover what he has paid so that the parties would stand *in statu quo;* and also has the right to affirm the contract and recover damages for the fraud. It is claimed, however, by appellants that the defendant was not in position to rescind, because he had not tendered back all he had received, and the point is made that the money received from the sale of the milk rigs and milk cans, aggregating $135, had not been returned. The creamery having been destroyed by fire January 13, 1911, the defendant regarded it good business policy to sell the articles and hold the money in the treasury of the company, and also it is claimed that because of a fire which destroyed the creamery the defendant was not in position to place the plaintiffs *in statu quo,* hence could not rescind. In this connection it is also insisted that by delay, acquiescence, and waiver the defendant lost his right to rescind, if he ever had any, and that moreover the defendant had an adequate remedy at law, hence equity will not interpose. We think the equitable counterclaim states a good cause of action in equity. Moreover, no objection was taken to it by way of demurrer or answer on that ground, but the plaintiffs replied to the merits and the issues raised by the counterclaim and reply thereto were tried out upon the merits. That the equitable counterclaim must be sustained on the facts here is supported by the decisions of this court. *Miller v. Drane,* 100 Wis. 1, 75 N. W. 413; *Gullickson v. Madsen,* 87 Wis. 19, 57 N. W. 965; *Hall v. Bank,* 143 Wis. 303, 127 N. W. 969; *Hall v. Bell,* 143 Wis. 296, 127 N. W. 967; *Resch v. Senn,* 31 Wis. 138; *Scott v. Menasha,* 84 Wis. 73, 54 N. W. 263; *Hoff v. Olson,* 101 Wis. 118, 76 N. W. 1121; *Mahn v. Chicago & M.*

E. R. Co. 140 Wis. 8, 121 N. W. 645; *Pierstoff v. Jorges,* 86 Wis. 128, 56 N. W. 735; *Bigelow v. Washburn,* 98 Wis. 553, 74 N. W. 362. The defendant offered to do equity in the counterclaim for rescission. The court found upon sufficient evidence that in the latter part of December, 1910, and again January 20, 1911, the defendant demanded rescission. The $135 received for wagons and milk cans is held by the treasurer of the creamery company. The delay in demanding rescission and taking steps to enforce it is, we think, sufficiently explained in the evidence, and no extended discussion of the evidence on the point is necessary. Appellants specially rely upon payment of $250 by defendant to plaintiffs in January, 1911, as ratification of sale and waiver of right to rescind. But it appears that defendant did not have full information respecting the falsity of the representations at that time; besides, the conditions under which this payment was made did not amount to a payment such as would constitute ratification or waiver. The destruction of the factory by fire cannot be attributed to the defendant. Moreover, the money paid on adjustment of the loss represents the factory and is held by the clerk of the court pending the litigation, and is $1,908.95, while the evidence is that the factory at the time of sale was not worth more than $1,500. So the $135 received for property sold, and the insurance money, $1,908.95, being held for plaintiffs, the defendant offers to do equity in that regard, and it cannot be said that plaintiffs have been prejudiced by such changed conditions. We are not able to say that justice has not been done by the court below in the adjustment of the rights and equities between the parties, nor that the findings are not supported by the evidence.

It is further complained by counsel for appellants that a certain action which was pending at the time this action was commenced in which *George A. Baker* and *H. A. Wheeler* were plaintiffs and *August E. Becker* was defendant in some

manner has become wiped out by the instant action. True, the record in the other action was by stipulation of parties in this action put in evidence and made a part of the record in this action "for the sole purpose of placing such record before the court so that it can be informed of the nature of the action and the issues involved, and not for the purpose of being considered as evidence either for or against the plaintiffs or defendant in this action." Just what the purpose of putting the record in under such a stipulation was, is not very apparent. It is probable, however, that it was not the intention to consolidate the actions, or to adjudicate the issues involved in such other action in this, but to allow the other action to stand upon its own merits. However, the proper time to determine whether the issues involved in this action are *res adjudicata* in another is when such other is under consideration by the court, and since it may be, as appears from the stipulation and the whole record, that it was not the intention of the parties to litigate the issues in the other action in this, we should not attempt to consider them here. Of course if the issues involved in this action, or any of them, between the same parties, are the same as those involved in the other action, then the determination of such issues here is *res adjudicata* there. *Rowell v. Smith,* 123 Wis. 510, 102 N. W. 1; *Wentworth v. Racine Co.* 99 Wis. 26, 74 N. W. 551; *Grunert v. Spalding,* 104 Wis. 193, 80 N. W. 589; *Hart v. Moulton,* 104 Wis. 349, 80 N. W. 599.

The court below confirmed the taxation of costs by the clerk as in an equity action. This is also relied upon as error by counsel for appellants. The appellants insist that the character of the action as to being legal or equitable as regards costs must be determined from the complaint, while the respondent insists that the whole litigation grew out of the defendant's counterclaims, the principal one being equitable, therefore the defendant was entitled to full costs as in equitable actions. The question seems to have been settled

by this court in *Ward v. American H. F. Co.* 119 Wis. 12, 96 N. W. 388, against the contention of respondent, to the effect that where the action is at law upon contract the fact that an equitable counterclaim is set up and litigated does not change the character of the action as to costs. Counsel for respondent insists that *Ward v. American H. F. Co., supra,* is not in point because in that case judgment went for plaintiff, while on the equitable counterclaim in the present action the judgment was for defendant. But we think it clear that under the statute relating to costs the character of the action, whether one at law upon contract, or in equity, must be determined from the complaint. Sec. 2921, Stats. Costs in the instant case other than disbursements were allowed at $98.24. They should have been limited under the statute to $25 and disbursements. Sec. 2921, Stats. For this error the judgment must be modified.

By the Court.—The judgment of the court below is modified by reducing the item of $98.24, costs taxed exclusive of disbursements, to $25, and as so modified is affirmed. The appellants are entitled to costs in this court.

JONES, Appellant, vs. CAIRD, Respondent.

April 10—April 29, 1913.

Deeds: Delivery: Parent and child: Acceptance, when presumed: Conveyance to take effect after grantor's death: Will or grant? Revocation: Parol evidence of intention.

1. When a father executes and causes to be recorded a deed of his land to his infant child and brings this to the knowledge of the child, and the grant is beneficial to the infant, and the latter thereafter makes claim to the land under the deed, its acceptance is presumed and the delivery is complete.
2. Such a deed in the ordinary form of a warranty deed, except that after the description of the property was inserted: "This deed is given upon the express condition that the title and posses-

sion of the property conveyed is not to pass during the life of the party of the first part, but is to be absolute at his death," is construed to be, not a testamentary disposition, but a grant of the land in fee simple to the grantee, to commence in possession and enjoyment after the death of the grantor, and hence not subject to revocation.

3. Such being the legal effect of the instrument, oral testimony of the grantor to the effect that he intended a testamentary disposition was incompetent and unavailing.

4. A conveyance of land in fee to take effect at a future time is valid in this state.

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Affirmed.*

The appeal is from a judgment dismissing the complaint of the plaintiff.

The plaintiff on November 29, 1899, being the owner of certain real property, executed to his daughter, then aged fifteen years, *Agnes B. Jones,* now the defendant *Agnes B. Caird,* and caused to be recorded in the office of the register of deeds of the proper county, a warranty deed of this real estate in ordinary form, except that it contained the following inserted after the description of the property:

"This deed is given upon the express condition that the title and possession of the property conveyed is not to pass during the life of the party of the first part, but is to be absolute at his death."

A preceding clause in the deed contained the ordinary words of conveyance to the defendant and her heirs and assigns forever. A *habendum* clause following the above quoted language reads: "To have and to hold the said premises as above described, with the hereditaments and appurtenances, unto the said party of the second part, and to her heirs and assigns forever." There was no other delivery of the deed, but the plaintiff informed his daughter that he had given her the land. The daughter grew up and married. The father, who was a widower at the time of making the deed, also married in September, 1900. He now seeks by this action to revoke this deed on the ground of nondelivery, and on the

further ground that it was in law an attempted testamentary disposition of the property and either void as such or revocable. The learned circuit court dismissed the complaint.

The plaintiff offered oral evidence tending to show that at the time of the execution of this deed he was in fear of sudden death in one of the fainting spells to which he was subject and the deed executed for that reason for the purpose of protecting his daughter in case of such death, and that he intended the deed to act as a will.

For the appellant there was a brief by *E. L. & E. E. Browne* and *L. D. Smith*, and oral argument by *Mr. Smith*. They cited, among other cases, *Spencer v. Robbins*, 106 Ind. 580, 5 N. E. 726; *Bowdoin College v. Merritt*, 75 Fed. 480, 483; *Nichols v. Emery*, 109 Cal. 323, 41 Pac. 1089, 1091; *Ellis v. Pearson*, 104 Tenn. 591, 58 S. W. 318; *Sharp v. Hall*, 86 Ala. 110, 5 South. 497; *Smith v. Holden*, 58 Kan. 535, 50 Pac. 447; *Lautenshlager v. Lautenshlager*, 80 Mich. 285, 45 N. W. 147; *Lauck v. Logan*, 45 W. Va. 251, 31 S. E. 986; *Thomas v. Singer S. M. Co.* 105 Minn. 88, 117 N. W. 155; *Whitten v. McFall*, 122 Ala. 619, 26 South. 131; *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177; *Powers v. Scharling*, 64 Kan. 339, 67 Pac. 820; *Leaver v. Gauss*, 62 Iowa, 314, 17 N. W. 522; *DeBajligethy v. Johnson*, 23 Tex. Civ. App. 272, 56 S. W. 95; *Turner v. Scott*, 51 Pa. St. 126; *Terry v. Glover*, 235 Mo. 544, 139 S. W. 337; *In re Kiseckers Estate*, 190 Pa. St. 476, 42 Atl. 886.

D. W. McNamara, for the respondent.

TIMLIN, J. (1) When a father executes and causes to be recorded in the register's office a deed of his land to his infant child, brings this to the knowledge of the child, and the grant is beneficial to the infant, and the latter thereafter makes claim to the land under the deed, its acceptance is presumed and the delivery is complete. *Whiting v. Hoglund*, 127 Wis. 135, 106 N. W. 391; *Cooper v. Jackson*, 4 Wis.

537; *Cerney v. Pawlot,* 66 Wis. 262, 28 N. W. 183; *Northwestern Mut. L. Ins. Co. v. Wright, ante,* p. 252, 139 N. W. 1078; *Arrington v. Arrington,* 122 Ala. 510, 26 South. 152; *Edlich v. Gminder,* 65 App. Div. 496, 72 N. Y. Supp. 885; *Hayes v. Boylan,* 141 Ill. 400, 30 N. E. 1041, 33 Am. St. Rep. 326; *Tobin v. Bass,* 85 Mo. 654; *Issitt v. Dewey,* 47 Neb. 196, 66 N. W. 288; *Chambers v. Chambers,* 227 Mo. 262, 127 S. W. 86, 137 Am. St. Rep. 567, 578; *Decker v. Stansbury,* 22 Am. & Eng. Ann. Cas. 227 and cases in note.

(2) A conveyance of land in fee to take effect at a future time is valid in this state. *Ferguson v. Mason,* 60 Wis. 377, 19 N. W. 420. Where a deed containing unlimited words of grant and the usual *habendum* clause also provided: "This conveyance is not to become absolute until after the decease of us both [grantors] . . . and then only on this condition," etc., this was considered a valid deed with a condition subsequent. *Drew v. Baldwin,* 48 Wis. 529, 4 N. W. 576. See, also, *Donnelly v. Eastes,* 94 Wis. 390, 69 N. W. 157. In construing deeds as in construing other contracts the fundamental inquiry is, "What was the intention of the parties?" *Barkhausen v. C., M. & St. P. R. Co.* 142 Wis. 292, 124 N. W. 649, 125 N. W. 680. The apparent intention here is to retain in the grantor all dominion and ownership over the land during his life consistent with an unconditional grant in fee simple, to become absolute or to "commence in possession and enjoyment" at his death. Secs. 2034, 2048, Stats. In order to hold that the grantor in this case did not intend such conveyance but did intend a testamentary disposition of his property, we must ignore the name and character of the instrument selected and executed by him, the recording thereof, the inconsistent covenants in that instrument, such as warranty, the mode of execution, and choose that construction which will make the instrument void because it is not executed with the proper formalities, rather than that which would make it valid. There is no evidence tending to show

that this was executed as a will should be. The law on this subject is well collected in a note to *Wilson v. Carrico,* 49 Am. St. Rep. 213 (140 Ind. 533, 40 N. E. 50). The quality of revocability attempted to be attached to this instrument rests upon the theory that it is in substance and effect a testamentary disposition. But if it is such it is void because not executed as required by law, and the question of revocation becomes immaterial. We cannot assume that the legal effect of this instrument is the same as that of a will and, treating that as a premise, conclude that it is a will. That is "begging the question." The question is rather, What is the legal effect which the grantor intended and the instrument tends to support? and in arriving at the answer it is a fair presumption that he intended something valid and effectual rather than something void and useless. The precedents in this court heretofore cited, as well as the following cases from other courts, suggest that this instrument should be construed as a deed carrying a grant in fee simple to the grantee, to commence in possession and enjoyment after the death of the grantor: *Dexter v. Witte,* 138 Wis. 74, 119 N. W. 891; *Cates v. Cates,* 135 Ind. 272, 34 N. E. 957; *White v. Hopkins,* 80 Ga. 154, 4 S. E. 863; *Graves v. Atwood,* 52 Conn. 512; *Webster v. Webster,* 33 N. H. 18, 66 Am. Dec. 705; *Wyman v. Brown,* 50 Me. 139.

(3) Giving the deed this construction, there is no repugnancy between the granting clause, the *habendum,* and the limitation of the commencement of the right to possession and enjoyment in the grantee.

(4) Such being the legal effect of the instrument, the oral evidence of the grantor to the effect that he intended a testamentary disposition was incompetent and unavailing. *Wheeler & W. M. Co. v. Laus,* 62 Wis. 635, 23 N. W. 17; *Kirch v. Davies,* 55 Wis. 287, 11 N. W. 689; *Schwalbach v. C., M. & St. P. R. Co.* 73 Wis. 137, 40 N. W. 579.

By the Court.—Judgment affirmed.

MORTENSON, Appellant, vs. MURPHY, imp., Respondent.

April 10—April 29, 1913.

Foreign corporations: Disability to take title to land: Interest of grantee of such corporation: Adverse possession: Tacking: Privity: Statute removing disability: Construction: Validation by grantor of prior conveyance: Mortgages: Foreclosure.

1. Although a conveyance of land in this state to a foreign corporation which had not complied with sec. 1770*b*, Stats., was void, yet a grantee of such corporation who went into possession of the land under his deed had an interest therein which he could convey or mortgage, to wit, possession under claim and color of title.
2. One to whom such grantee of the foreign corporation sold and conveyed the land could tack his possession to that of said grantee to make up the ten-year period in which title could be acquired by adverse possession; and so also could purchasers at a mechanic's lien sale who succeeded to his rights.
3. Sufficient privity exists where one claims succession in right by an involuntary conveyance or by operation of law to permit a tacking of possessions so as to secure the benefit of a statute of limitation.
4. Where the original grantee of the foreign corporation mortgaged the land and afterwards sold and conveyed it subject to the mortgage, the right of the mortgagee was superior to that of the purchaser, and the interest acquired by the latter and those claiming under him, including the right of possession and the inchoate right to obtain title by adverse occupancy, might be foreclosed and sold under the mortgage.
5. Ch. 142, Laws of 1911 (sec. 1770*j*, Stats.), which attempted to cure the defect in the title of foreign corporations to lands conveyed to them before compliance with sec. 1770*b*, Stats., where they had afterwards complied therewith, did not have the effect to vest the title in such a corporation immediately, but was in the nature of a statute of limitation and allowed the party dealing with the corporation a year in which to disaffirm his contract, and if he did not do so the conveyance in effect became validated.
6. Land in this state had been conveyed to a foreign corporation coming within the terms of ch. 142, Laws of 1911. Such corporation conveyed to one Clare, who took possession and thereafter mortgaged the land to a bank, and then sold and conveyed it, subject to the mortgage, to one Morse. Through fore-

closure of a mechanic's lien and subsequent conveyances the interest of Morse became vested in Murphy. After the enactment of the law of 1911 the original grantor of the foreign corporation quitclaimed to the mortgagee bank, and the bank thereafter quitclaimed the land and assigned the mortgage to plaintiff. In an action against Murphy and others to foreclose the mortgage, plaintiff having elected to take the position that defendants had an equity of redemption in the premises, it is *held* that the purpose of said original grantor in quitclaiming to the bank was to validate his conveyance to the foreign corporation and thereby to place all parties in the same position they would have occupied had the corporation been competent to receive and to transfer title in the first instance; hence that the mortgage is the prior and paramount lien and should be foreclosed accordingly.

APPEAL from a judgment of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Reversed.*

On February 1, 1907, Rosenbaum, being the owner of the real estate in controversy, conveyed the same to the Western Land Securities Company, a foreign corporation, which had not filed its articles of incorporation as required by sec. 1770*b*, Stats., and which did not comply with the law in this regard until August 7, 1909. After receiving the conveyance from Rosenbaum the corporation contracted to sell the property to one Clare. On April 17, 1907, the corporation deeded the land to Clare by a deed of warranty and Clare went into possession of the same under his deed. On May 7, 1908, Clare executed the mortgage in suit to the Westfield State Bank. On the same day Clare conveyed the premises by warranty deed to the defendant Morse, subject to the $3,000 mortgage which he had given to the bank. Morse continued in possession of the premises for some time and purchased materials which were used in repairing the buildings thereon. A mechanic's lien was filed by one of the parties furnishing material, and foreclosure proceedings were instituted thereon, and a judgment was entered establishing a lien on all of the right, title, and interest of Morse in the premises and declaring such lien to be paramount to the rights of any party

claiming an interest in the premises subsequent to the time when the material was sold and delivered. On January 10, 1910, the interest of Morse and of all persons claiming through or under him after June 15, 1908, was sold to satisfy the mechanic's lien claim aforesaid, the sheriff's deed reciting that the premises were sold for $280, subject to the mortgage of the Westfield State Bank. The purchasers at the sale were John and Hugh Hamilton, and on August 6, 1910, the Hamiltons quitclaimed to the defendant *Margaret Murphy*. Three days later she went into possession. On September 11, 1911, Rosenbaum executed a quitclaim deed of the premises in suit to the Westfield State Bank. On November 24, 1911, the Westfield State Bank quitclaimed the premises to the plaintiff and on November 17th assigned its mortgage to him. This action was brought in March, 1911, to foreclose the mortgage. On May 13, 1911, ch. 142 of the Laws of Wisconsin for the year 1911 was published, and on July 22, 1911, ch. 664 of the Laws of 1911 was published, sec. 12 of which latter act amended the former. The defendant *Margaret Murphy* appeared and answered by way of defense and counterclaim. She alleged that her title and right of possession to the premises gained under the mechanic's lien foreclosure proceedings were prior and paramount to the right of the mortgagee and that she also had a substantial claim for betterments. Part of the relief demanded was that the quitclaim deeds from Rosenbaum to the bank and from the bank to the plaintiff be canceled and set aside as a cloud on her title. Other essential facts upon which the defendants relied will be stated in the opinion. The trial court held that the defendants *Margaret* and C. C. Murphy were entitled to judgment dismissing the complaint; that *Margaret Murphy* was entitled on her counterclaim to a judgment determining her right to and interest in the lands to be of the value of $1,200 because of permanent improvements placed thereon after she went into possession, and that she

had an interest therein for the additional sum of $710 because of permanent improvements placed thereon by the defendant Morse, which she owned through her purchase under the foreclosure proceedings; that she was entitled to a judgment quieting her title to the premises in dispute as against the plaintiff and her codefendants, except her husband; and that the quitclaim deeds referred to were a cloud on the title which should be removed by a judgment of the court. From a judgment entered in accordance with the findings of fact and conclusions of law the plaintiff appeals.

For the appellant there was a brief by *John A. Conant, Rogers & Rogers,* and *W. S. Stroud,* and oral argument by *Mr. Stroud* and *Mr. Harlan Rogers.*

For the respondent there was a brief by *Ryan & Kelm,* and oral argument by *E. H. Ryan.*

BARNES, J. The trial judge reached the conclusion that the deed from Rosenbaum to the corporation was void as to the corporation because of noncompliance with the provisions of sec. 1770*b*, Stats.; that the corporation having no title could convey none to Clare, and that Clare had nothing which he could mortgage to the bank or deed to the defendant Morse, and that therefore the mortgage was void and of no effect and could not be foreclosed.

He further held that the effect of ch. 142, Laws of 1911, was to validate the deed from Rosenbaum to the corporation and vest title in the latter, but that the grantees of the corporation did not derive any benefit from the statute because it did not affect pending actions. He further concluded that, the statute referred to having divested Rosenbaum of his title and vested it in the corporation prior to the conveyance by quitclaim deed to the bank, he had no title to convey when this deed was executed, and that therefore neither the bank nor the plaintiff secured any interest under the quitclaim deeds.

When Clare executed the mortgage to the bank he was in

possession of the premises in controversy, claiming title under a warranty deed from the ostensible owner of the record title. His occupancy was adverse and hostile to the world. If it continued for a period of ten years his title would become absolute. He had an interest which he could convey, to wit, possession under claim and color of title. His grantee, by virtue of the deed of conveyance to him, could materially shorten the necessary period in which to acquire title by adverse possession. It is quite obvious that under such a statute as our sec. 4211 Clare had some interest which he could grant by deed. This being so, the right or interest could be mortgaged. Any interest in real property that "is capable of an absolute sale may be the subject of a mortgage." *Bull v. Shepard,* 7 Wis. 449, 461. The right of the mortgagee was prior in time and right to that of the purchaser from Clare. Morse took the possession and the inchoate right to obtain title by adverse user, subject to the rights of the mortgagee. He could tack his possession to that of Clare to make up the ten-year period. The purchasers at the mechanic's lien sale succeeded to the rights of Morse only. There was such privity between them and Morse that they and their grantees could tack their possession to that of Morse and Clare and claim title by adverse occupancy as against the holder of the legal title ten years from the date that Clare took possession, if the successive possessions were continuous. Sufficient privity exists where one claims succession in right by an involuntary conveyance or by operation of law to permit a tacking of possessions so as to secure the benefit of a statute of limitation. *Ill. S. Co. v. Budzisz,* 106 Wis. 499, 508, 509, 82 N. W. 534; Wood, Limitations (3d ed.) sec. 271; 1 Cyc. 1003 and cases cited in note 62; 2 Am. & Eng. Ency. of L. & P. 453 and cases cited. In so far as the plaintiff and *Mrs. Murphy* are concerned they must claim title through a common grantor, if they claim title at all. We see no reason why the interest transferred to Morse might not be foreclosed and that interest which included the right

of possession be sold and transferred to the mortgagee. We therefore conclude that it was error to dismiss the complaint in the foreclosure suit.

The only remaining question which it is necessary to treat is the effect of the quitclaim deeds from Rosenbaum to the bank and from the bank to the plaintiff. If the corporation took nothing under the deed from Rosenbaum, then Rosenbaum did not part with his title. The ownership of the property rested in some one and that some one must be either Rosenbaum or his grantee. If it went to the grantee the mortgage would be entirely regular. If it did not, then Rosenbaum had the right to dispose of the property to whomsoever he saw fit. He evidently did not want to take advantage of the technicality which would permit him to sell the premises a second time, and he deeded to the bank, the then holder of the mortgage, for the apparent purpose of validating the attempted transfer of the property by the corporation. He had a perfect right to do this. The circuit judge concluded that under ch. 142, Laws of 1911, whatever title Rosenbaum had was vested in the corporation and that therefore he had nothing to convey and his grantees took nothing by the conveyance. The learned circuit judge was also of the opinion that the grantees of the corporation, under the warranty deed which it had given, could not claim any benefit from the after-acquired title of the corporation because the statute did not affect pending actions.

If the statute did not affect pending actions, then we think it would not operate to transfer title from Rosenbaum to the corporation, because the present action was pending when the statute was passed.

We do not decide that the legislature could not pass a statute such as the trial judge construed this to be. The question is not before us, because the effect of the law was not to immediately transfer title to the corporation from its grantor. The statute reads as follows:

"1. Any corporation organized otherwise than under the laws of this state, having acquired, or attempted to acquire, legal title by deed, or lease to any real property in this state, before complying with the terms of section 1770*b* of the statutes, or acts amendatory thereof, and which has thereafter, and before the passage of this act, complied with said section, shall be and is hereby relieved from any disability provided in said statute or prohibition therein contained, so far as said section relates to the acquisition and holding of the property so acquired, or attempted to be acquired.

"2. Any person claiming that the legal title of any corporation or of any person claiming by, through, or under such corporation, to any real property acquired, or attempted to be acquired, is invalid by reason of the failure of any corporation coming within the terms of subsection 1 of this act, to comply with section 1770*b* of the statutes, or acts amendatory thereof, shall commence action to recover the property, or to declare the legal title of said corporation void, or interpose a defense on such grounds, within one year from the passage and publication of this act, and in case of failure to do so his right of action or defense, based upon the failure to comply with said section by any such corporation, shall be deemed to have expired; provided that this act shall not affect any action now pending." Laws of 1911, ch. 142.

This is in the nature of a statute of limitation. It makes it incumbent on the party dealing with the corporation to assert his right by action or defense within one year from the passage of the act. If he does not do so, he will be barred from thereafter making a claim. Title was not taken away by the statute. It could be asserted at any time within the period stated. If it was not so asserted, the corporation in effect got title at the expiration of the year by force of the statute. The act allowed the party dealing with the corporation a year in which to disaffirm his contract. If he did not do so, it in effect became validated. This is the construction placed on the act in *Lanz-Owen Co. v. Garage E. M. Co.* 151 Wis. 555, 139 N. W. 393.

The effect of the quitclaim deeds from Rosenbaum to the

bank and from the bank to the plaintiff was either to convey the title to the plaintiff or to validate the transfers originally made from Rosenbaum to the corporation and from the corporation to Clare. If the first effect followed, then the quitclaim deeds should not have been canceled, because the plaintiff's title was paramount to any claim of title which the defendants had. *Roehm v. Zehren,* 103 Wis. 287, 79 N. W. 216. If the second result followed, then the plaintiff was clearly entitled to foreclose his mortgage. The plaintiff has elected to take the position that the quitclaim deed did not in fact convey the entire title and that the defendants had an equity of redemption in the premises. The defendants are benefited by this election, inasmuch as it gives them the right to redeem from the plaintiff's mortgage. While the conveyance from Rosenbaum was not made to the immediate grantee of the corporation, it was made to the party who had made the largest investment in the premises on the belief that the deeds to and from the corporation were valid, and we think it should be held that it was the purpose of Rosenbaum to validate his transaction with the corporation when he gave the subsequent quitclaim deed and to place all parties in the same position that they would have occupied had the corporation been competent to receive and to transfer title in the first instance. Under this holding the plaintiff's mortgage is prior and paramount to the interest acquired by Morse and to the interest of those claiming under the foreclosure proceeding in the mechanic's lien case. It follows from what has been said that the judgment must be reversed, and the cause remanded with directions to enter a judgment of foreclosure and sale in the action for the amount due on the mortgage.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter a judgment of foreclosure and sale in accordance with this opinion.

KROGH, Respondent, vs. MODERN BROTHERHOOD OF AMERICA, Appellant.

April 10—April 29, 1913.

Mutual benefit insurance: Evidence: Presumption against suicide: Coroner's verdict: Admissibility: Amount recoverable: Presumption as to what one assessment would produce: Burden of proof.

1. Where death occurs under such circumstances that it may or may not have been caused by suicide, it will be presumed to have been unintentional.
2. Where a certified copy of the verdict at a coroner's inquest was not furnished as a part of the proof of death, as required by a certificate of insurance, but such a copy was attached to the notification of death sent to the insurer by its agents, the claimant having had nothing to do with it and knowing nothing about it, such copy could not be received in evidence against the claimant as being an admission against interest.
3. Where, upon death of the insured, a mutual benefit certificate entitles the beneficiary to share in the mortuary fund to the amount of one full assessment on all members in good standing, not to exceed a certain sum, it will be presumed that one assessment would equal the maximum sum so named, and the burden of showing the contrary rests upon the insurer.

APPEAL from a judgment of the circuit court for Waupaca county: BYRON B. PARK, Circuit Judge. *Affirmed.*

The defendant is a fraternal benefit association organized and doing business under and by virtue of the laws of Iowa, and as such organization is lawfully admitted to transact business in this state. On September 14, 1908, it issued to William Krogh, the husband of the plaintiff herein, a certificate of insurance upon his life which entitles the beneficiary, *Ida Krogh,* his wife, to participate in the mortuary fund to the amount of one full assessment on all members in good standing in the fraternity, not to exceed $1,000. The certificate also provided that if the holder thereof should die by his own hands, whether sane or insane, then it should be null

and void and of no effect, and that all moneys paid or rights accrued thereunder should be absolutely forfeited. William Krogh died on June 6, 1911. Proofs of death were furnished defendant, and upon its failure to pay the insurance within the time specified in the certificate an action at law was brought thereon. The defendant set up the defense that William Krogh died by an intentional act of his own hand. The jury found (1) that the death of William Krogh was not caused by suicide, and (2) that he was sane at the time of his death. Judgment for the full amount of $1,000 was entered in favor of the plaintiff, from which the defendant appealed.

For the appellant there was a brief by *Allan V. Classon,* and oral argument by *Mr. Classon* and *Mr. Benjamin Poss.*

For the respondent there was a brief by *E. L. & E. E. Browne* and *Lloyd D. Smith,* and oral argument by *Mr. Smith.*

VINJE, J. The defendant assigns as errors (1) that the evidence fails to sustain the finding that the insured did not commit suicide; (2) that the court erred in refusing to receive in evidence the verdict of the coroner's inquest; and (3) that if plaintiff is entitled to recover she can recover only nominal damages.

1. William Krogh was about forty-two years old at the time of his death. He had been a stone mason for a number of years, and for a year previous to his death had been suffering some from chronic bowel trouble and had consulted several doctors with reference thereto. On the morning of his death he had been given a thorough examination by Dr. Wood, who testified: "He appeared very natural, very rational. I did not find any indication of any serious trouble and I told him he would get better." On his return from the doctor's office he brought a bottle of medicine, put it on a desk in the house, and went to his shop, situated from seventy-

five to a hundred feet to the rear of the house. He was somewhat of a carpenter, and when not working at his trade as a mason would spend a good deal of his time in the shop. He was married in 1904 and lived happily with his wife, owed no one anything, and had about $100 in the bank. There was some evidence that he was at times depressed and suffered somewhat from melancholy; that three days or so before his death, without any cause, he accused one of his best friends of slandering him. The day before his death he worked in the garden. The next morning he got up at 6 o'clock, his usual time, had his breakfast, and then helped his wife wash the breakfast dishes. She noticed nothing peculiar about him. He seemed as he always did. About fifteen minutes after he left the house on his return from the doctor's office, his wife had occasion to pass the shop door. On looking in, she found her husband lying on the floor, three or four feet back from the door, with a revolver on the right side of him about five feet distant. Deceased was a right-handed man. The revolver was a thirty-eight caliber double action one, that could be discharged by pulling the trigger. One chamber was empty. The barrel had been sawed or filed off. He had owned it since he was married, and usually kept it in a desk in the dining room. *Mrs. Krogh* thinks he did not get it from the desk that morning. The bullet wound was on the left side of the breast, a little to the right of the left nipple. His clothing around the wound was on fire, and the hole in the clothing was about the size of a silver dollar. The bullet was not extracted or probed for, and its direction in the body is not disclosed by the evidence. He was not dead when found, but expired shortly afterwards without making any statement or regaining consciousness. Several persons who knew him intimately testified that they had noticed nothing abnormal about him previous to his death. Immediately after his death the agents of the defendant made out proofs of death, signed by the plaintiff, wherein it was stated that

the deceased came to his death voluntarily and intentionally, by his own hand. Subsequently the plaintiff sent amended proofs of death wherein she said that she did not understand the full meaning of the statement contained in the first proof and that she had no knowledge or belief that Krogh met his death voluntarily by his own hand.

Such in brief is the evidence showing the conditions and circumstances under which the insured came to his death. That such conditions and circumstances are in many respects consistent with the theory of suicide must be admitted. But they are equally consistent with accidental death. That he died as the result of a bullet wound from the revolver found beside him, discharged by himself, seems quite certain. Whether such discharge was intentional or accidental is the only mooted question. The wound was in a place where it could have been intentionally self-inflicted. It was likewise in a place where it could have been accidentally self-inflicted. In either case, if the revolver happened to be held close to the person the result as found would or might have followed. So we can reach no conclusion from the location or nature of the wound as to whether it was intentionally or accidentally inflicted. It may be said to be strange that a revolver should be so held that if accidentally discharged it would result in a wound like the one in question. The answer is, that very strange cases of accidental shooting with revolvers do occur, especially with such a short one as this was; and that men, be they never so careful, at times meet with accidents that seem quite improbable.

The evidence fails to disclose any sufficient or satisfactory reason for suicide. The insured had no financial or domestic troubles of any kind so far as is shown. His disposition seems to have always been an even one. He was a man who was quiet and self-contained, though not of a brooding nature, and aside from a partial impairment of health for the last year there was discovered nothing abnormal about him.

He purchased a bottle of medicine for himself the morning he died, presumably after the visit to the doctor. That he should do so intending suicide seems hardly probable. However, it must be conceded that the theory against suicide, aside from the presumption of law that obtains against it, based upon the whole evidence, is not entirely satisfactory. Neither does an hypothesis in favor of suicide meet all the conditions of the evidence. In this situation resort must be had to the legal presumption that, where death occurs under such circumstances that it may or may not have been caused by suicide, it will be presumed to have been unintentional, and the burden rests upon the defendant to prove the contrary. *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217, 80 N. W. 1020; *Rohloff v. Aid Asso.* 130 Wis. 61, 109 N. W. 989; *Cady v. Fidelity & C. Co.* 134 Wis. 322, 113 N. W. 967. The defendant has not met that burden here. Especially must it be so held where the jury has found against it and the verdict to that effect has the approval of the trial court. In addition to the cases cited above, counsel for respondent calls our attention to the following cases from other jurisdictions that sustain the rule as to the presumption against suicide: *Scott v. Sovereign Camp W. O. W.* 149 Iowa, 562, 129 N. W. 302; *Paulsen v. Modern Woodmen,* 21 N. Dak. 235, 130 N. W. 231; *Walden v. Bankers' Life Asso.* 89 Neb. 546, 131 N. W. 962; *Wheelock v. Home L. Ins. Co.* 115 Minn. 177, 131 N. W. 1081; *Peterson v. Prudential Ins. Co.* 115 Minn. 232, 132 N. W. 277; *Equitable L. Ins. Co. v. Hebert,* 37 Ind. App. 373, 76 N. E. 1023; *Masonic L. Asso. v. Pollard's Guardian,* 121 Ky. 349, 89 S. W. 219. The appellant, to sustain the contention that death was suicidal, relies upon *Voelkel v. Supreme Tent K. M. W.* 116 Wis. 202, 92 N. W. 1104; *Hart v. Fraternal Alliance,* 108 Wis. 490, 84 N. W. 851; *Richey v. Woodmen of the World,* 163 Mo. App. 235, 146 S. W. 461; *Hardinger v. Modern Brotherhood,* 72 Neb. 860, 101 N. W. 983, 103 N. W. 74; *Ingh-*

ram v. National Union, 103 Iowa, 395, 72 N. W. 559. These cases differ so in their facts from the case at bar that no effort will be made to distinguish them. They are referred to because they may be of use in analogous cases.

2. It is claimed the court erred in refusing to receive in evidence the verdict of the coroner's inquest. The certificate of insurance required that, if a coroner's inquest has been held, a copy of the coroner's verdict or the verdict of the coroner's jury, properly certified, shall be furnished by the claimant as a part of the proof of death. That was not done in this case. No certified copy of the coroner's verdict was attached to the proofs of death furnished by the plaintiff. But instead, it seems that such a copy was attached to a notification of the death of Krogh made by the agents of the defendant to it as required by its by-laws. And it was this copy that was sought to be introduced. The plaintiff had had nothing to do with it and knew nothing about it. Had it been a part of the proofs of death furnished by her it would have been competent as an admission against interest, which, while not conclusive, would have been *prima facie* evidence against her. *Bachmeyer v. Mut. R. F. L. Asso.* 82 Wis. 255, 52 N. W. 101; *Hart v. Fraternal Alliance,* 108 Wis. 490, 84 N. W. 851; *Hanna v. Connecticut Mut. L. Ins. Co.* 150 N. Y. 526, 44 N. E. 1099; *Ins. Co. v. Newton,* 22 Wall. 32. But where the coroner's verdict is furnished by the company's agents the rule does not apply. Nothing they do without the knowledge or consent of the plaintiff or beneficiaries can be received as admissions against them, and the verdict of the coroner's jury was properly excluded. *Olwell v. Milwaukee St. R. Co.* 92 Wis. 330, 66 N. W. 362; *Hedger v. State,* 144 Wis. 279, 128 N. W. 80; *Cox v. Royal Tribe of Joseph,* 42 Oreg. 365, 71 Pac. 73, 60 L. R. A. 620; *Dougherty v. Pacific M. L. Ins. Co.* 154 Pa. St. 385, 25 Atl. 739.

3. The claim that plaintiff can recover only nominal damages is based upon the argument that since the certificate entitles her to share in the mortuary fund to the amount of one full assessment on all members in good standing in the fraternity, not to exceed $1,000, and since there is no proof what such an assessment would amount to, she is entitled to only nominal damages. In *Jackson v. Northwestern M. R. Asso.* 73 Wis. 507, 41 N. W. 708, it was held that an action at law was maintainable on a benefit certificate; that it was not necessary to go into a court of equity to enforce it; and that under the pleadings in that case plaintiff could recover substantial damages. It was not, however, decided in that case upon whom the burden rested to show how much an assessment would amount to. The Iowa court has held that the burden rests upon the plaintiff. *Bailey v. Mut. Ben. Asso.* 71 Iowa, 689, 27 N. W. 770, which was followed in *Rainsbarger v. Union Mut. Aid Asso.* 72 Iowa, 191, 33 N. W. 626. That the rule in these cases has since been at least limited, if not overruled, is apparent from the language used in *Hart v. Nat. M. A. Asso.* 105 Iowa, 717, 725, 75 N. W. 508, where the court says:

"We are of the opinion that the certificate in suit is a contract for the payment of fixed sums of money upon the happening of special contingencies, but subject to the limitation that the liability of the defendant shall not exceed the sum which could be realized from one quarterly payment made by persons who were members of the association at the time of the accident; that it must be presumed, in the absence of a showing to the contrary, that the sum which would be realized from such payment would be sufficient to pay the sums for which the certificate provides; and that, if it would not be sufficient, it is necessary for the defendant, in order to reduce the amount of plaintiff's recovery, to plead and show the fact. It is not necessary in the first instance to compel the defendant to make an assessment, even though it show that it has not in its possession funds with which to pay the

amount due; but an action at law may be maintained to obtain judgment for the amount shown to be due, and a recovery for that amount be had, unless it be reduced by a showing on the part of the defendant that it would exceed the amount which an assessment of two dollars made upon persons who were its members at the time of the accident would produce. The defendant did not plead or prove any fact which would have reduced the amount for the payment of which the certificate, on its face, provides."

The limitation of the certificate in that case was, "This association does not agree to pay to any certificate holder or beneficiary, in any case, either by way of indemnity or a benefit, a greater sum than is realized by said association from one quarterly payment of two dollars made and collected from those who were members at the time of the accident." We think the better rule is to place such burden upon the defendant, and to hold that in the absence of any proof on the subject it will be presumed that one assessment equals the maximum sum named in the certificate. If it does not, it is easy for the defendant to interpose such defense and prove it. All the books, records, lists of members in good standing, and evidence necessary for such proof are in its possession and peculiarly within its knowledge. It would be extremely burdensome and expensive to require plaintiff in each case to prove such fact in order to make out a *prima facie* case. This rule has the sanction of the following authorities: *Lueders' Ex'r v. Hartford L. & A. Ins. Co.* 4 McCrary, 149, 12 Fed. 465, 473; *Elkhart M. A., B. & R. Asso. v. Houghton,* 103 Ind. 286, 2 N. E. 763; *Supreme Lodge K. of P. v. Knight,* 117 Ind. 489, 20 N. E. 479; *People's Mut. Ben. Soc. v. McKay,* 141 Ind. 415, 39 N. E. 231; *Supreme Council A. L. of H. v. Anderson,* 61 Tex. 296.

By the Court.—Judgment affirmed.

AUGUST REBHAN COMPANY, Appellant, vs. TAYLOR and another, Respondents.

April 11—April 29, 1913.

Principal and agent: Right to commissions on sale by principal: Insurance.

1. Defendants, as local agents of the plaintiff to sell insurance at certain rates for a certain commission, secured prospective purchasers of insurance in their territory who were ready to purchase if they could secure a satisfactory rate, but who could not be induced to take the insurance at the rate fixed by plaintiff. Defendants notified plaintiff of that fact, whereupon plaintiff, without defendants' knowledge, reduced the rate and itself sold the insurance to said purchasers. *Held*, that defendants were entitled to their commission on the sale.
2. In such case defendants were properly allowed commissions on the premiums for the whole period of the insurance, notwithstanding the policies were temporarily canceled for the purpose of defeating their claims.

APPEAL from a judgment of the circuit court for Wood county: BYRON B. PARK, Circuit Judge. *Affirmed.*

The plaintiff was the general state agent of the Casualty Insurance Company of North America, and the defendants were the local agents of the plaintiff for the placing of insurance in that company at Grand Rapids and surrounding territory. Prior to December 26, 1907, the Citizens Trust Company of Milwaukee had been the general state agent of the insurance company, and the defendants had been the local agents, but on the day last named the plaintiff became the general agent, and continued the defendants in its employ as local agents. The action is brought to recover an alleged balance due upon account for premiums collected by defendants from December 22, 1909, up to April 9, 1910, upon insurance sold by them as agents of the plaintiff, after deducting twenty per cent. for commission, which is admitted to be the agreed rate of compensation. The balance claimed in the complaint is $2,202.71.

The defendants admit the correctness of the amount so far as it goes, but allege, by way of counterclaim, that they were

the exclusive agents for the plaintiff at Grand Rapids and vicinity up to April 5, 1910, and that in February, 1910, the plaintiff, without defendants' knowledge, placed insurance on the Nekoosa-Edwards Paper Company and the Centralia Pulp & Water Power Company, the same being industries situated within the defendants' territory, on which the premiums amounted to $15,024 and the commissions due to the defendants to $3,102, which commissions have never been paid.

The action was tried before a jury. There is little dispute on the material facts. The contest was over certain transactions in February, 1910, which may be briefly stated as follows:

The Nekoosa-Edwards Paper Company of Port Edwards and the Centralia Pulp & Water Power Company of Centralia, Wisconsin, for some years had carried a large amount of employer's liability and workman's collective insurance in the Casualty Company, which had been placed by the defendants as local agents. These industries were within the territory expected to be served by the defendants' agency. Their policies expired February 1, 1910. Early in January the plaintiff urged the defendants to secure renewals of this insurance at the old rates, and defendants attempted to do so, but failed because the insured parties thought the rates too high, and were offered lower rates by John E. Eldred, Jr., an insurance agent of Milwaukee, who represented the Ocean Accident & Guaranty Corporation. January 31st the defendants wired to the plaintiff that the renewals were lost and that the rates had been cut. On the following day Mr. Alexander, acting for the Nekoosa-Edwards Company, arranged with Mr. Eldred for employer's liability and workman's collective insurance for that company at fifty-four cents and $1.22 respectively, which rates were considerably less than the rates under the former policies in the Casualty

Company. When Mr. Eldred reported the risks to his company it refused to accept the risks, and Eldred then tried to place the insurance elsewhere. He applied to the plaintiff, and the plaintiff, after obtaining authority from the home office of the Casualty Company, issued policies at the last named rates to the Nekoosa-Edwards and Centralia companies without the knowledge of the defendants. These policies were delivered to Mr. Eldred, who in turn delivered them to the insured companies. Eldred received the commissions. These policies were canceled June 22, 1910, and the risks carried in other companies until October 1, 1910, when policies covering the same risks were again issued in the Casualty Company, which ran until October 1, 1911. When the defendants learned of the issuance of the policies of February 1, 1910, they demanded their commissions of the plaintiff, and a controversy was carried on between the parties for some time, until on April 5, 1910, the plaintiff canceled the agency of the defendants, and subsequently this action was brought to settle the rights of the parties.

A single question was submitted to the jury as a special verdict, which, with its answer, is as follows:

"At the time plaintiff and defendants entered into their contract, was there a general custom among writers of casualty insurance that the general agent should not, directly or indirectly, overhead write the local agent? *A.* Yes."

The trial court allowed the defendants' counterclaim for commissions on the insurance issued by plaintiff without defendants' knowledge for the period from February 1, 1910, to October 1, 1911, amounting to $1,496.54, which being deducted from the plaintiff's claim of $2,202.71, leaves $706.17, for which sum, with interest and costs, judgment was rendered for the plaintiff, and plaintiff appeals.

Julius E. Roehr, for the appellant.

For the respondents there was a brief by *Goggins & Brazeau,* and oral argument by *B. R. Goggins.*

WINSLOW, C. J. The principal contentions of the plaintiff are that there was no exclusive agency shown and no sufficient evidence to establish the custom which the jury found existed. We do not find it necessary, however, to discuss these questions. Under simple and well known principles the judgment is right upon the undisputed facts.

The defendants were the agents of the plaintiff corporation to sell insurance at certain rates in this territory for a certain commission. While acting as such agents they secured prospective purchasers of insurance, who were ready to purchase if they could secure a satisfactory rate. The defendants were unable, however, to induce the prospective purchasers to take the insurance at the rate fixed by the plaintiff and so notified the plaintiff. The plaintiff thereupon, while defendants' agency still continued and without the defendants' knowledge, stepped in and reduced the rate, and thereby itself sold the insurance to the said purchasers, through Mr. Eldred, who was in legal effect the agent of the purchasers. In substance, the principal prevented the agent from effecting the sale and earning his commission by fixing a prohibitive price, and then secretly lowered the price, and by this means accomplished the sale itself, without the agent's knowledge, and while the agency still existed. That the payment of the agent's commissions cannot be avoided by this means is settled. *Oliver v. Katz,* 131 Wis. 409, 111 N. W. 509; *O'Keefe v. Stephenson,* 135 Wis. 342, 115 N. W. 805; *Terry v. Bartlett, ante,* p. 208, 139 N. W. 1133. We think the court was right in allowing commissions to the defendants up to October 1, 1911, notwithstanding the temporary cancellation of the policies from June 22 to October 1, 1910, for it quite plainly appears that this temporary cancellation was principally for the purpose of defeating the defendants' claim for commissions.

By the Court.—Judgment affirmed.

STROSIN, Appellant, vs. WISCONSIN RIVER PAPER & PULP COMPANY, Respondent.

April 11—April 29, 1913.

Master and servant: Injury from machinery: Contributory negligence.

Plaintiff, the operator of a barking machine in defendant's mill, instead of using a stick with which he might safely have dislodged the refuse material which clogged a spout leading from the knives of the machine, thrust his hand into the spout so far that it came in contact with the revolving knives and was injured. The jury having, upon sufficient evidence, negatived his claim that defendant's foreman had assured him there was no danger in cleaning the spout by hand, the trial court properly held that plaintiff was, as a matter of law, guilty of contributory negligence.

APPEAL from a judgment of the circuit court for Portage county: BYRON B. PARK, Circuit Judge. *Affirmed.*

Action for a personal injury.

Plaintiff, when injured, was about twenty-one years of age. He had a fair education for a country boy accustomed to much manual labor. He had lived most of the time on his father's farm near Stevens Point, but worked in the woods in various kinds of operations, including that of attending a somewhat similar machine to the one by which he was injured. He had worked at the particular machine, called a hand barker, for a sufficient length of time to understand its operations. The purpose thereof was to remove bark from bolts of pulpwood. The bolts were about two feet long. The machinery which did the mischief was covered, except where necessarily left open to receive the bolts. There was a disk, armed with knives, which, in service, revolved at great speed. It was back of the opening through which the bolts were put by hand and pressed up so as to engage the knives. As the bark was sheared off, it was driven by a draft created by a fan into a nine-inch iron spout for some eleven

inches, thence into a galvanized iron pipe about twenty-four inches, thence following the course of the pipe, down through the floor. There was an opening in the galvanized pipe, about four inches wide by six inches long, near the iron pipe and some seventeen inches from the disk. Through this opening, in case of the pipe clogging with refuse, the operator had to reach with his hand or some other instrument, and remedy the difficulty. This could be done without danger by using a stick, or doing the work with the hand when the machine was at rest. It was dangerous to otherwise do it by hand, unless care was used not to insert the hand far enough to come in contact with the back of the revolving disk or the fan which created the current of air. Plaintiff knew of the danger, but was accustomed, notwithstanding, to clean the barker by hand. He had worked at the particular machine but a short time before the injury, though he had worked at a machine doing similar work, called an automatic barker. A hook was customarily used on that in the cleaning operations, in case of such operations being conducted while the machine was at speed and in service; but the hook could not be so used on the hand barker. The foreman was opposed to having the operator shut down the machine to do the cleaning. On the occasion before the particular one, as plaintiff testified, when he was about to stop the machine to enable him to clean the pipe, the foreman objected, upon the ground that the cleaning could be done while the work was going on. Plaintiff claimed to have been directly assured that there was no danger in cleaning out the spout by hand and that the foreman stood by and saw him do it that way. The latter denied that and was corroborated. When the spout was cleared of the *débris* the clearance would be indicated by the outward air current from the fan. On the next occasion for cleaning the machine, the refuse was so packed in the pipe that plaintiff made two insertions with his hand without dislodging it. He made a third effort and, by some unexpected movement,

his fingers engaged the fan or disk and were taken off at the second joints.

The claim of plaintiff was that he thought, left to himself, it was dangerous to clean the barker by hand when the machine was in motion, but did so upon the assurance that it was safe to do it.

The jury decided thus: The foreman did not assure plaintiff there was no danger in cleaning the pipe while the barker was in motion. Defendant was negligent in failing to instruct plaintiff as to cleaning the barker. Such failure was a proximate cause of the injury. Defendant negligently failed to warn plaintiff of the danger of cleaning the barker, as he did. Such failure was a proximate cause of such injury. Plaintiff was free from contributory negligence. If he is entitled to recover at all he is entitled to $1,400.

On motion for judgment the trial judge expressed himself as having been, from the time the evidence was closed, of the opinion that, except for plaintiff's evidence that the foreman assured him there was no danger in cleaning the barker by hand when it was in motion and that he relied thereon, defendant was entitled to have a directed verdict, and the jury having found against plaintiff as to such matter, the evidence indicated contributory carelessness notwithstanding the verdict to the contrary on that precise question. The judge gave his reasons in these words:

"The plaintiff testified that he knew that if his hand came in contact with the revolving disk of the barker he would be injured. Any person of any ordinary intelligence would know and realize that injury would certainly follow if he thrust his hand in the blow-pipe far enough to reach the disk while the barker was in motion. The plaintiff is apparently a person of ordinary intelligence. The plaintiff knew that all the bark and shavings from the spruce sticks were blown out of the barker into the pipe. The door in the pipe was, according to the plaintiff, eleven inches from the barker, according to the defendant sixteen inches. The plaintiff had

to extend his hand into the pipe from eleven to sixteen inches to reach the revolving disk, and this he carelessly did, notwithstanding he knew to do so meant injury to his hand."

Judgment was ordered thereon dismissing the complaint with costs.

For the appellant there was a brief signed by *A. L. Smongeski*, attorney, and *Kreutzer, Bird, Rosenberry & Okoneski*, of counsel, and oral argument by *Mr. Smongeski* and *Mr. C. B. Bird*.

For the respondent there was a brief by *Weed & Hollister*, and oral argument by *R. A. Hollister*.

MARSHALL, J. The trial court seems to have been guided by principle, as illustrated by numerous precedents in this court, holding that plaintiff was clearly guilty of contributory negligence in thrusting his hand into the spout up to a point where it was liable to engage the dangerous machinery which severed his fingers, unless he did so on the express assurance of the foreman that the work could be safely done that way. The respect due that decision precludes us from reversing it.

So the case must turn on whether the assurance was given as plaintiff claims. The court below, through abundant caution, submitted the conflicting evidence in respect thereto to the jury, resulting in a finding in defendant's favor. Why that should not be regarded a verity, is not suggested. On the contrary, it seems to be conceded, as the fact is, that the case must be dealt with as if the claim of plaintiff in respect thereto, is not true. From that viewpoint, as indicated in the statement, we have the opinion of the trial judge, that the evidence as matter of law, shows that plaintiff proximately contributed to the event complained of. We are unable, on principle, to override that decision.

By the Court.—Judgment affirmed.

TIMLIN, J., dissents.

GUNSTEN, Appellant, vs. GREEN, Respondent.

April 11—April 29, 1913.

Sale of horses: Fraud: Intoxication: What horses included: Evidence: Value: New trial: Newly discovered evidence: Special verdict: Form.

1. Findings by the jury that a sale of nine horses by defendant to plaintiff did not include the three horses for nondelivery of which the action is brought; that when he signed a note for the price and a chattel mortgage of the horses purchased, plaintiff was not so intoxicated as to be incapable of understanding the transaction; and that he knew, at the time, what horses were described in the mortgage, are *held* to be sustained by the evidence.
2. Where the parties to a sale of horses differed in their testimony as to what horses were included therein, evidence as to the value of the horses was admissible.
3. A motion for new trial on the ground of newly discovered evidence is properly denied where the alleged new evidence is merely cumulative and furnishes no substantial ground for believing that, had it been presented to the jury at the trial, a different result would have been reached.
4. The form of a special verdict is largely in the discretion of the trial court, and it is sufficient if it covers the material issues in such a way as to resolve all disputes in respect to them.

APPEAL from a judgment of the circuit court for Portage county: A. H. REID, Judge. *Affirmed.*

This is an action to recover damages for the nondelivery of three horses which the plaintiff alleges he bought of the defendant, but never received. The defendant alleged by way of counterclaim that there is due him from plaintiff $700 on a note, and seeks to foreclose a chattel mortgage held by him to secure payment of this sum.

The defendant was a horse dealer operating in and about Stevens Point, Wisconsin, and other places. The plaintiff is a farmer living near Amherst, Wisconsin. The defendant had a barn and an agent at Amherst, where some of his horses were kept, and while there they were in charge of his agent, one Orrin Loomis. It appears that the horses kept at

this barn were charged to Loomis, and when he sold them the proceeds, after the original cost was deducted, were divided between Loomis and *Green*.

On May 26, 1911, the plaintiff, *Gunsten*, came to Amherst and went to defendant's barn on the afternoon of that day, and while there he looked at some horses described by him as follows: a gray mare, weight about 1,300 pounds, about five years old; two bay geldings, weight about 1,400 each, four and five years old respectively. Orrin Loomis told the plaintiff that these horses were the property of himself and *Green* and that they were for sale. The next morning, between 7 and 8 o'clock, the plaintiff returned to the barn, when *Green* told him that Loomis could no longer work for him because he drank and that he was going to sell everything in the place and end their business relation. The plaintiff and *Green* then negotiated as to the value of the horses in the barn and those in the pasture back of the barn, and a deal was finally consummated by which the plaintiff purchased nine horses from *Green*. Some of the horses which plaintiff claims were in the barn the night before and included in the purchase were not delivered to him by *Green*, who claims they were not included in the sale. *Green* made a memorandum of the nine horses sold to plaintiff, with the cost price of each, and delivered it to the plaintiff. It was agreed that plaintiff was to pay $700 for the horses.

Later in the day, about 1 or 1:30 o'clock, the plaintiff and Loomis, both of whom had been drinking considerable, were seated in a saloon, when *Green* entered and requested the plaintiff to sign a check for $700, which the plaintiff refused to do. *Green* then drew up a judgment note and a chattel mortgage describing the horses, which the plaintiff signed. The defendant seeks to recover on this note and mortgage upon his counterclaim.

Plaintiff claims and alleges that the horses mentioned in the chattel mortgage are not the same as those he purchased;

that *Green* knew at the time he signed the note and mortgage that he was intoxicated and took advantage of it to defraud him; that he never received three of the horses which were in the barn when he first went there and which were included in his purchase.

Defendant claims that the three horses plaintiff now claims were not included in the sale, but that three other horses, which plaintiff refuses to accept, were included and delivered to the plaintiff. The three horses which the defendant avers were included in the sale are described in the memorandum and in the chattel mortgage. Defendant testified they were fully described to the plaintiff as follows: a stallion, which Loomis had bargained to one Krostue, a nephew of the plaintiff, at the agreed price of $300, $150 of which had already been paid, but that the sale was not to be consummated until the balance was paid, which the plaintiff was to collect; a brown mare then in the possession of a man at Amherst who had her on trial, and if he bought her was to pay $150, otherwise she was to be returned to plaintiff (the defendant further alleges that she was in fact returned to the barn and to the plaintiff); a little black horse delivered to plaintiff, which he allowed Loomis to sell.

It appears that the defendant recovered but two of the horses through the foreclosure of the chattel mortgage and that these were sold for $125, and the proceeds, after deducting the costs, were applied on the plaintiff's note, and that the balance on the note remains unpaid, for which the defendant was awarded judgment on his counterclaim with costs.

The findings of fact by the jury are as follows: (1) that the nine horses sold to the plaintiff did not include the two bay geldings and the gray mare as claimed by the plaintiff; (2) that the plaintiff, *Gunsten*, was not so completely intoxicated at the time of signing the note and the chattel mortgage that he was incapable of understanding the transaction and the contents of the note and mortgage; (3) that the plaint-

iff, at the time of signing such instruments, knew what horses were described therein. Upon these findings the court awarded judgment dismissing the plaintiff's complaint and gave to the defendant judgment on his counterclaim for the amount due on the note and his costs of action in the sum of $763.96. Plaintiff moved the court for judgment notwithstanding the verdict, and in the alternative to set aside the answers to questions in the special verdict and for judgment, or for a new trial on the minutes of the court or on the grounds of newly discovered evidence.

This is an appeal from the judgment dismissing the complaint and awarding judgment on defendant's counterclaim and from the order denying a new trial.

For the appellant there was a brief by *E. L. & E. E. Browne* and *Lloyd D. Smith,* and oral argument by *Mr. Smith.*

For the respondent there was a brief by *Fisher, Hanna & Cashin,* and oral argument by *W. E. Fisher.*

SIEBECKER, J. The main issue presented by the plaintiff's complaint and the answer thereto is, Did the sale of nine horses by the defendant to the plaintiff include the three horses the plaintiff now claims and which were not delivered to him? This issue was specifically submitted to the jury by questions 1 and 3 of the special verdict. The jury found against the plaintiff upon this issue. An examination of the evidence material to this question discloses that there is a conflict in this evidence and the court properly submitted this controversy to the jury for determination. In the light of the evidence on this question the jury's findings cannot be disturbed. It cannot be said that such findings are against a clear preponderance of the evidence and that the trial court's action was clearly wrong. It is furthermore contended that the court erred in overruling defendant's motion for a new trial upon newly discovered evidence on this question as to whether or not the horses plaintiff now claims were

included as three of the nine horses he purchased from the defendant. We have examined the alleged new evidence and find it wholly fails to establish a ground for a new trial. It is obvious that it is cumulative evidence on the issue tried and that it furnishes no substantial grounds for believing that had this evidence been presented to the jury at the trial a different result from the one expressed in their verdict would have been reached by them. The exception to the court's ruling permitting the defendant to testify to the value of the horses included in the sale is without merit. The evidence was proper in view of the plaintiff's evidence as to what horses he understood were included in the $700 purchase price and as to what interest Loomis had in the horses under an arrangement with the defendant.

It is argued that defendant perpetrated a fraud on the plaintiff by colluding with Loomis to induce plaintiff to sign a judgment note and chattel mortgage while plaintiff was in a state of intoxication. The note plaintiff signed was for $700, due in thirty days. It is conceded that the amount is correct and that it runs for the period agreed upon by the parties. The chattel mortgage is in the usual form, given to secure payment of this note, and covers nine horses, describing them. The defendant testifies that the horses described therein are the nine horses sold to the plaintiff; that the plaintiff took actual possession of seven of them at the time of the sale and that the remaining two horses were in the hands of persons who had bargained for them; that the terms of their sale were explained to and understood by the plaintiff; and that he bought them under the arrangements for their sale to the persons in whose possession they then were. The facts and circumstances and the evidence of Loomis sustain the claim of defendant as to the terms and condition of the sale.

The jury found that the chattel mortgage correctly describes the horses purchased by the plaintiff at the time in

question. The evidence amply sustains the jury's findings that plaintiff was capable of fully understanding and appreciating the contents of the note and mortgage and that he knew what horses were described in the mortgage when he signed it. In the light of all these facts, there is no room for argument upon the question as to whether the defendant participated in bringing about plaintiff's intoxication and wrongfully took advantage thereof by inducing plaintiff to sign these instruments and thereby perpetrated a fraud on him. Nor can it be said that the court committed error in submitting the special verdict in the form he did, as to the question of fraudulent and wrongful conduct to induce the plaintiff to execute the note and mortgage while in a state of intoxication. The verdict covers these questions sufficiently to resolve all disputes in respect to them. The record shows that the parties had a fair trial, that the issues were fully presented to the jury, that they determined all material issues by their special verdict, and that the court committed no error affecting any substantial rights of the appellant.

By the Court.—The judgment appealed from is affirmed.

LANGOWSKI, Appellant, vs. WISCONSIN CENTRAL RAILWAY COMPANY, Respondent.

April 11—April 29, 1913.

Railroads: Injury to trespasser on bridge: Gross negligence of engineer: Evidence: Instructions to jury: Special verdict: Form: Inspection of defendant's books, etc.

1. In an action for personal injuries sustained by plaintiff, who was struck by an engine while crossing a river on a railway trestle, the evidence is *held* to sustain a finding by the jury that after the time he discovered plaintiff on the trestle the engineer was not guilty of gross negligence in respect to stopping the train so as to avoid the accident.

2. In view of the issue raised as to gross negligence, there was no error in charging the jury that plaintiff was a trespasser on the trestle and that such an act is made punishable by the laws of this state.
3. Referring to the testimony of a witness for plaintiff that the train could have been stopped before reaching the bridge, the court charged that the jury should carefully weigh the testimony of such witness, should consider first his competency and the experience he had had in stopping trains and making tests, and should give his evidence such weight as they thought it deserved. The court also referred to the testimony of witnesses for defendant as to actual tests, and stated that the defense claimed that such tests were made under conditions similar to those existing at the time of the accident and were more accurate and satisfactory as to the distance within which the train could have been stopped than the testimony of plaintiff's witness based upon his experience and calculations; and directed the jury to consider all the evidence. It appeared that plaintiff's witness had left the service of defendant about thirty days before the accident on account of a disagreement, and came into the case as a witness under peculiar circumstances, and had never stopped a train under the conditions in question. *Held*, that there was no error in the charge.
4. Nor was there error in a charge to the effect that if, after the engineer discovered plaintiff on the bridge, he could not by the use of reasonable and due care have stopped the train before plaintiff was struck, then the jury should not find the engineer guilty of gross negligence, but if he could have stopped the train by the use of due care in time to have prevented the accident the jury should give that fact its proper weight in determining whether he recklessly and wantonly ran the plaintiff down.
5. Questions proposed for special verdict which cover no issuable fact, or which relate to matters otherwise properly submitted, are properly refused.
6. A question proposed for special verdict as to "what amount of punitory damages will compensate the plaintiff," was properly refused.
7. A witness who was subpœnaed to appear before a court commissioner and produce the engineer's report of the accident and the books of defendant showing what kind of air-brake apparatus was used on the train in question, testified that he knew nothing about the air-brakes, had no access to any books pertaining to them, did not know whether the company had

records showing what kind of air-brake apparatus was in use on the day of the accident, and knew nothing about the report of the accident or whether defendant had such report. *Held*, that there was no error in denying a motion that the witness be required to produce such books and report for plaintiff's inspection.

APPEAL from a judgment of the circuit court for Portage county: JAMES O'NEILL, Judge. *Affirmed.*

This is an action brought to recover damages for personal injuries sustained by plaintiff by being struck by one of defendant's engines while crossing the railroad bridge of defendant at Stevens Point, Wisconsin. The complaint sets up two causes of action: one for ordinary negligence and one for gross negligence. Issue was joined on both causes of action. The jury returned the following verdict:

"(1) From and after the time that Engineer Gleason discovered the plaintiff or some member of his family on the bridge, was said engineer guilty of gross negligence in the operation and control of his engine and train, in respect to stopping the same so as to avoid the accident? *A.* No.

"(2) If you answer the first question 'No' you need not answer this; but if you answer the first question 'Yes,' then answer this: Was such gross negligence in the operation and control of his engine and train by the engineer the proximate cause of plaintiff's injury? *A.* ——.

"(3) In case the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* $500."

Plaintiff moved for judgment upon the undisputed evidence, and for judgment notwithstanding the verdict, to amend the verdict, to set the verdict aside and for a new trial, which motions were denied and due exception taken. The defendant moved for judgment on the verdict and on the undisputed evidence, which motion was granted. Judgment was entered for defendant, from which this appeal was taken.

A. L. Smongeski, for the appellant, contended, *inter alia,* that after the engineer or fireman saw the plaintiff he had

knowledge that plaintiff was in a dangerous position, and it then became the duty of the members of the train crew to exercise all the means at hand consistent with the safety of the train to avert the accident, and the fact that plaintiff was a trespasser or was violating the law of the state became eliminated from the case at that moment. 1 Thomp. Comm. on Neg. § 25; 2 id. § 1735; *Louisville & N. R. Co. v. Morlay,* 58 U. S. App. 526; *Alabama G. S. R. Co. v. Moorer,* 116 Ala. 642, 22 South. 900; *Palmer v. C., St. L. & P. R. Co.* 112 Ind. 250, 14 N. E. 70; *Purcell v. C. & N. W. R. Co.* 109 Iowa, 628, 80 N. W. 682; *Heddles v. C. & N. W. R. Co.* 77 Wis. 228, 46 N. W. 115; *Rideout v. Winnebago T. Co.* 123 Wis. 297, 101 N. W. 672; *Anderson v. C., St. P., M. & O. R. Co.* 87 Wis. 195, 207, 58 N. W. 79. Trial judges in charging the jury should not go into the testimony in detail, or give special significance to the facts testified to on one side only of the case. *Coman v. Wunderlich,* 122 Wis. 138, 99 N. W. 612; *Conway v. Mitchell,* 97 Wis. 290, 72 N. W. 752; *Hopkins v. Rush River,* 70 Wis. 10, 34 N. W. 909, 35 N. W. 939; *Kavanaugh v. Wausau,* 120 Wis. 611, 98 N. W. 550.

For the respondent there was a brief by *W. A. Hayes* and *Fisher, Hanna & Cashin,* and oral argument by *Mr. Hayes.*

KERWIN, J. The principal assignments of error in this case involve the question of the sufficiency of the evidence. In other words, Is the verdict supported by the evidence? The evidence shows that the plaintiff was injured while crossing defendant's trestle over the Wisconsin river at Stevens Point. Defendant's trestle is about 600 feet long and about twenty-five feet above the water. The Wisconsin river, over which this trestle is constructed, flows in a southerly direction and is about three fourths of a mile west of defendant's depot. The floor of the trestle consists of ties, guard rails and track rails, and is not planked. The ties are about twelve

feet long and eight inches wide, with spaces between them varying from four to six inches. There is no highway for a considerable distance from either end of this trestle. About 1,200 feet west of the river is a curve through a deep cut, so that from the trestle one cannot see a train approaching from the west until it emerges from the cut. There was at the time of the injury, at each end of the trestle, a sign upon which was written "Dangerous. All persons are forbidden to walk upon the tracks under penalty." Twenty trains a day pass over the trestle and it requires about fifteen minutes to walk across it. There are between the two ends of the trestle forty-four places about twenty-eight feet apart where a person can stand aside while a train passes.

On Sunday, November 29, 1908, the plaintiff, his wife, and four children, three girls and a boy, ranging in age from six to thirteen years, entered upon this trestle from the east end. They were on their way home, and could have gone without crossing the trestle by way of regularly traveled streets. Plaintiff had lived in Stevens Point thirty-eight years and was familiar with the situation. The train which struck plaintiff, when running on schedule time, had about fourteen minutes to make the run from Junction City to Stevens Point, a distance of eleven miles. About the time plaintiff and his family started westward over the trestle, defendant's limited passenger and mail train started eastward from Junction City. The girls preceded plaintiff, and when about half way across the trestle heard the whistle of the approaching train, notified plaintiff, and immediately started to run. They got across the trestle, stepped aside, and escaped injury. The plaintiff, his wife and boy were struck, the wife being killed instantly, the boy's skull fractured, and the plaintiff injured. The train consisted of an engine and seven cars equipped with Westinghouse automatic quick-action air-brakes. On account of the curve the engineer could not see the trestle until about 700 feet from it. The fireman

could see it somewhat sooner, and as the train came out of the cut he saw persons upon the trestle near the west end and immediately told the engineer. The speed of the train going out of the cut and onto the straight track enabled the engineer to see the plaintiff about the time the fireman saw him. Upon seeing plaintiff the engineer instantly put on all braking power, applied the sand, and the train came to a stop upon the trestle after striking plaintiff.

It is perfectly clear from an examination of the whole evidence that it fully supports the finding of the jury that the engineer was not guilty of gross negligence in the operation and control of his engine and train in respect to stopping the same so as to avoid the accident. We shall therefore spend no time in discussing this proposition. The plaintiff carelessly and recklessly, with the intention of crossing, went upon the trestle with his family, where he had no right to be, and the operators of the train had no reason to believe that any person would be upon the trestle or attempt to cross it in the face of imminent danger. From the time the engineer and fireman saw plaintiff or any member of his family until they were struck, only a few seconds elapsed, and the evidence shows very clearly that during that time everything that could reasonably be done by the engineer to stop the train was done.

Several errors are assigned in the admission and exclusion of evidence, but they are wholly without merit and we shall take no time in discussing them.

Appellant also complains of the charge to the effect that the court told the jury that the plaintiff was a trespasser on the trestle on the day of the accident and that such an act is made punishable by the laws of this state. There was no error in this charge. It was proper in view of the issue raised respecting the gross negligence of the engineer. *Pinoza v. Northern C. Co.* 152 Wis. 473, 140 N. W. 84; *Anderson v. C., St. P., M. & O. R. Co.* 87 Wis. 195, 58 N. W. 79.

Counsel for appellant also complains of the following portion of the charge:

"The plaintiff has offered the testimony of witness Menzel to show that the train could have been stopped before reaching the bridge. It will be the duty of the jury carefully to weigh the testimony of this witness. You will consider first his competency, the experience he has had in stopping trains and making tests, and give his evidence such weight as you think it deserves. The defendant has offered testimony of several witnesses who have made actual tests under what is claimed to be similar conditions, as far as practicable, to determine the distance within which a similar train could be stopped. The witnesses have testified to tests made on last Thursday, Friday, Saturday, and Sunday. It is the claim of the defense that these tests were made under practically similar conditions to those existing on the day of the accident, and it is further claimed that these actual tests are more accurate and satisfactory as to the distance within which the train could have been stopped than the testimony of the plaintiff's witness based upon his experience and calculations. The witnesses for the defense who have testified state that under the conditions observed the train could not have been stopped before reaching the bridge. Several of them give it as their opinion that under the conditions assumed to have existed on the day of the accident, the manner in which Engineer Gleason applied the brakes and operated the train was the proper way in which to have controlled the speed and made the stop in the shortest practicable space."

"The court will not attempt to refer particularly to the evidence on either side. It will be the duty of the jury to consider all this evidence for the purpose of determining whether the train could have been stopped before reaching the bridge and whether the engineer was guilty of such reckless and wanton conduct as amounted to gross negligence."

There was no error in this portion of the charge. It appears that the witness Menzel referred to left the service of defendant about thirty days before the accident on account of disagreement and came into the case as a witness under peculiar circumstances and had never stopped a train under the circumstances in question.

The following portion of the charge is also excepted to:

"If the jury find that after the engineer discovered the plaintiff or some members of his family on the bridge the engineer could not, by the use of reasonable and due care, have stopped the train before the plaintiff was struck, then it follows that the jury should not find the engineer guilty of gross negligence. A finding to this effect will be decisive in answering the question in the verdict. If the jury find that after such discovery of the persons on the bridge the engineer could have stopped the train by the use of due care in time to have prevented the accident, they will give such finding its proper weight in determining whether the engineer recklessly and wantonly ran the plaintiff down."

There was no error in this part of the charge.

Counsel for appellant also assigns error on refusal of the court to submit to the jury certain questions requested by appellant. Some of these requests cover no issuable fact, hence were properly refused. The seventh and eighth relate to the gross negligence of the engineer and also to the amount of damages, and these questions were submitted in proper form by the court. The ninth relates to the amount of punitory damages which would compensate plaintiff, and this was properly refused.

The tenth assignment of error relates to the denial of plaintiff's petition for inspection of the books of the defendant for the purpose of ascertaining what kind of air-brake apparatus was used on the train in question and the report of the accident by the engineer to the defendant. One Millington was subpœnaed to appear and produce the books of the company and report of the accident. He appeared pursuant to the subpœna and submitted to full examination, but did not produce the books nor the report for the reason that he did not have possession of them. He testified that he knew nothing about the air-brakes and had no access to any books pertaining to them, and did not know whether the company had records showing what kind of air-brake apparatus was in use on the day of the accident; that he knew nothing about

the report of the accident or whether the defendant had such report. It is therefore clear that no error was committed in denying plaintiff's petition for inspection.

In the instant case there was such a lack of evidence to support the charge of gross negligence that it is quite clear that, even if error had been committed under the several heads complained of, it could not in any way have prejudiced appellant. Further discussion of the case seems unnecessary. It is plain that the plaintiff had a fair trial and no prejudicial error was committed.

By the Court.—The judgment of the court below is affirmed.

JELINEK, Respondent, vs. BAER, imp., Appellant.

April 11—April 29, 1913.

Justices' courts: Pleading: "Instrument for the payment of money only:" Contracts: Validity: Uncertainty: "Stock" in partnership: Surplusage: Acceptance: Performance: Mutual covenants.

1. Although a written contract containing a promise by defendant to pay a definite sum of money to plaintiff on or before a date named contains also a statement of the consideration therefor and other promises, yet in an action in justice's court founded solely upon the promise first mentioned it may be deemed an "instrument for the payment of money only," within the meaning of sub. 9, sec. 3626, Stats.; and the complaint in such action, setting out the contract and alleging that defendant is indebted thereon to plaintiff in the said sum with interest from the date named, is sufficient.
2. Delivery of such contract to plaintiff's agent, thence to plaintiff, and retention thereof by the latter and his bringing suit thereon constituted a sufficient acceptance by plaintiff, although the instrument was not signed by him.
3. A written contract is not void for uncertainty when its provisions can be explained and rendered certain by competent evidence; nor is it rendered void by surplusage. So *held* as to a

contract by which one party releases to a corporation all his interest and all his shares of stock in a certain company (which was in fact an unincorporated association or partnership having some sort of articles specifying a capital of 350 shares, of which said party owned 190) and "*consigns*" to said corporation "*all legal duties* and privileges incident to said 190 shares of stock."

4. Where a contract by which defendant agreed to pay a certain sum of money to plaintiff by a certain date contained no express covenants on the part of plaintiff, but a present release and assignment of certain so-called shares of stock, the rule of mutually dependent covenants has no application, and failure of plaintiff to deliver a further release and assignment, even assuming that defendant was entitled thereto, would not, in the absence of proof that defendant was damaged by such failure, defeat plaintiff's recovery upon defendant's promise to pay.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Lewis J. Somers, for the appellant, to the point that the instrument set forth in the complaint is not an "instrument for the payment of money only," cited, among other cases, *Hankinson v. Page,* 31 Fed. 184, 19 Abb. N. C. 274, 278; *Kratzenstein v. Lehman,* 19 App. Div. 228, 46 N. Y. Supp. 71; *Alder v. Bloomingdale,* 1 Duer, 601; *Veeder v. Lima,* 11 Wis. 419; *Strank v. Smith,* 36 Wis. 631; *Coe v. Straus,* 11 Wis. 72; *Carrington v. Bayley,* 43 Wis. 507; *Taylor v. Coon,* 79 Wis. 76, 48 N. W. 123.

Charles N. Brown, for the respondent.

TIMLIN, J. This action was commenced in justice's court, and the complaint there averred that the defendants were indebted to plaintiff in the sum of $120 with interest upon a written contract, a copy of which is as follows:

"We, the undersigned, do this day consent and agree to pay to *Mr. Benjamin Jelinek,* his successors or assigns, on or before the 21st day of June, A. D. 1911, the sum of one hundred and twenty dollars ($120), for which the aforesaid *Mr. Jelinek* releases all his interest and all of his one hundred and ninety (190) shares of stock in the Student Farmer Pub-

lishing Company to the Country Magazine Publishing Company, and consigns to said Country Magazine Company all legal duties and privileges incident to said 190 shares of stock. We, the undersigned, further agree upon this the fifteenth day of May, A. D. 1911, and hereafter to relieve said *Mr. Jelinek,* his successors or assigns, of any or all obligations of the Student Farmer Publishing Company and the Country Magazine Publishing Company following the balance as shown upon the books under the date of April first, A. D. 1911, and thereafter. We, the undersigned, upon this fifteenth day of May, A. D. 1911, acquiring all assets of Student Farmer Publishing Company and all liabilities of aforesaid Country Magazine Publishing Company and Student Farmer Publishing Company, following aforesaid balance of April first. "R. P. BEAN.
"A. C. BAER."

The defendant Bean was not served with process. The defendant *Baer* defaulted in justice's court and judgment went for the plaintiff, and from this judgment *Baer* appealed to the circuit court, where his demurrer to the said complaint was overruled. He then answered a general denial, charged fraudulent representations relied upon by him which induced him to enter into the contract, failure of the plaintiff to perform by turning over a certain typewriting machine to the Country Magazine Publishing Company, counterclaim for $50 for this machine, and other matters. After hearing evidence the court directed a verdict for the plaintiff. In response to the contentions of the learned counsel for appellant in criticism of the proceeding below, we say:

(1) The complaint is sufficient under sub. 9 of sec. 3626, Stats. In the interpretation of this statute it must be kept in mind that the object of pleading is to apprise the opposite party of the pleader's claim and that pleadings in justices' courts may be quite informal. The plaintiff's action is founded upon the promise to pay $120, and there is no claim by the plaintiff to recover upon any other promise contained in the writing. The words "written instrument for the pay-

ment of money only" may well have a different scope and effect in other statutes relating to a different subject matter.

(2) Delivery of this instrument to plaintiff's agent, thence to plaintiff, and retention thereof by the latter and his bringing suit thereon constituted a sufficient acceptance by plaintiff.

(3) There is no such uncertainty in the writing as to render it void. *"Certum est quod certum reddi potest."* It was shown that the Student Farmer Publishing Company was a corporation in which respondent was a shareholder, which had been dissolved in 1909, but was continued as an unincorporated association or partnership under the same name and under some kind of articles, which specified a capital of 350 shares of $1 each, and the respondent owned 190 of these shares; that the corporation and the succeeding association were engaged in publishing an agricultural journal called the Student Farmer. The name of this journal was changed to "The Wisconsin Country Magazine," and the "Wisconsin Country Magazine Publishing Company" was incorporated and continued the publication. The journal, its management and ownership, was an enterprise of persons connected with the agricultural department of the State University, and all the parties were concerned in this publication. The instrument contains a present release to the last mentioned corporation of all the interest of the respondent in an unincorporated association, and "consigns" (assigns?) to the latter the "legal duties" and privileges incident to said 190 shares of stock. There is no express covenant on the part of the respondent. He has released and assigned, and the appellant has all he bargained for in this respect. True, respondent has assigned and released not only his interest and privileges, but also his "legal duties." This concept must be in the very vanguard of advanced thought. Most people would gladly relieve themselves of their debts and other legal duties could they do so by assigning such obligations to a cor-

poration. Were it possible to so empower them by an amendment to the constitution, or a statute, we would no doubt have the amendment or the statute. But legal duties of the assignor cannot be assigned or even consigned. So this provision of the contract is impotent for good. An audacious mind might from this provision of the contract venture to think that those who are erudite as editors and agriculturists might not be learned in the law. But it is not otherwise harmful. These traits identify it as surplusage. *"Surplusagium non nocet; utile per inutile non vitiatur"* say the "musty precedents." Hence these words cannot be held to make the remainder of the instrument void for uncertainty. Within these old rules, approved by modern reason, the contract is sufficiently definite for enforcement.

(4) The defense of misrepresentation was not at all made out. It transpires that the representation was made by the other defendant to the appellant, and it was quite immaterial and resulted in no pecuniary loss to the appellant so far as shown.

(5) The contract containing no express covenants on the part of respondent, but a present release and assignment, the rule of mutually dependent covenants has of course no application, and if the appellant has been in any degree damaged by the failure of the respondent to execute and deliver a further release and assignment to the corporation, even assuming he was entitled to it, such damage has not been proven.

By the Court.—Judgment affirmed.

MILLER, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

April 11—April 29, 1913.

Gambling implements: Destruction: Measure of damages: Carriers.

1. Where an article (in this case a slot machine) is useful and usable for gambling purposes only, and gambling is unlawful, and it is not shown that the article has any value except for use as a gambling device, such value will not be regarded as a legitimate measure of damages to be recovered where the article is destroyed.
2. Where such an article has no value for any lawful purpose, no damages are recoverable against a carrier for an injury to it while in transit.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

For fourteen years plaintiff was in the business of buying and leasing slot machines. During that time he owned four or five hundred machines and sold a few, not to exceed twenty. His usual custom was to lease the machines to saloon and hotel keepers on an agreement that he was to receive as pay for their use one half the profits derived therefrom. The plaintiff looked after and cared for the machines so leased. He said: "When I know a machine is going to take a vacation pending an election or a wave of reform, I put it in a dry place."

On August 3, 1910, plaintiff boxed up and shipped a slot machine from La Valle to Necedah over the defendant's line of road. The machine was consigned to one Lecy, a saloonkeeper at Necedah, and was shipped for the purpose of being set up and used as a gambling device in Lecy's saloon, with the usual understanding as to compensation for its use. The machine was an eight-play quarter machine. The smallest coin that could be used therein was a quarter, and it advertised to pay as high as $20. The plaintiff testified that the chances on the machine were ten per cent. against the

player. Gambling slot machines were under the ban of the municipal authorities at Necedah when the shipment was made. The machine was broken in transit to such an extent that plaintiff claimed it was worthless, and this action was brought to recover damages resulting from the injury to the machine. When new the machines cost about $140. The one in question was second-hand, having been used for some time. There was no testimony to show the value of the machine for any other purpose except for use as a gambling device, or in fact that it had any value for any other purpose. The jury awarded the plaintiff $75 damages. The trial judge was of the opinion that plaintiff was entitled to recover the value of the article for the purposes of gambling and gave judgment on the verdict. Defendant appeals.

Edward M. Smart, for the appellant.

For the respondent the cause was submitted on the brief of *Grotophorst, Evans & Thomas.* They cited, among other cases, *Gulf, C. & S. F. R. Co. v. Johnson* (Tex.) 25 S. W. 1015; *Sutton v. Wauwatosa,* 29 Wis. 21; *Gerretson v. Rambler G. Co.* 149 Wis. 528, 136 N. W. 186; *McArthur v. Green Bay & M. C. Co.* 34 Wis. 139; *Steele v. Burkhardt,* 104 Mass. 59; *Gabbert v. Hackett,* 135 Wis. 86, 115 N. W. 345; *Delaware, L. & W. R. Co. v. Trautwein,* 52 N. J. Law, 169, 19 Atl. 178; *Compty v. C. H. Starke D. & D. Co.* 129 Wis. 622, 109 N. W. 650; *Judge v. N. P. R. Co.* 189 Fed. 1014.

BARNES, J. There is no claim on the part of either party that the machine in question was not a gambling device or that its use was not prohibited by secs. 4529 and 4531, Stats. Neither is there any claim that the machine was usable for any lawful purpose.

The judgment cannot stand unless the court holds that where an article is not usable and has no value for lawful purposes the right exists to recover for its value based on its use and usability for an unlawful purpose.

This question suggests some others that might arise: If a counterfeiter employed an engraver to make plates to be used in making counterfeit money and the plates were lost in the process of transportation or converted by some other party, could the cost price or their value for the unlawful use to which they were intended to be put be recovered? The same question might arise over a kit of burglar's tools valuable for the purpose of committing burglary, but having no particular value for any legitimate use. It is true that burglary and counterfeiting were offenses at common law while gambling was not. But no very good reason is apparent why the principle which would govern the cases assumed for the purpose of illustration would not apply to the actual case before the court.

The circuit judge decided the case on the authority of *Gulf, C. & S. F. R. Co. v. Johnson* (Tex.) 25 S. W. 1015. The case fully sustains the conclusion reached. It seems to be based on *Coolidge v. Choate,* 11 Met. 79. In the latter case the property involved was game-cocks. No attempt was made to recover on the basis of their value as fighting machines. Recovery was allowed on the theory that they had a market value when used for a lawful purpose. The same rule would apply to a pack of cards. We do not think the Massachusetts case passes upon the question decided in the Texas case. While the Texas case can be said to be directly in point, we think it was not correctly decided, and that the true principle upon which the decision should rest in the case under consideration is quite well established in this court and elsewhere.

The case of *Davelaar v. Milwaukee,* 123 Wis. 413, 101 N. W. 361, was brought to recover damages for negligently flooding a brick yard. There was evidence which tended to show that the plaintiff was a member of a combination formed to restrain trade. The court said: "If plaintiffs maintained ownership in an unlawful association . . . no damages for loss of business could be allowed them."

In *Raynor v. Valentin Blatz B. Co.* 100 Wis. 414, 76 N. W. 343, it was held that a tenant who was unlawfully evicted could not recover as part of his damages the profits which might be derived from the sale of liquor on Sunday.

Haggerty v. St. Louis I. M. & S. Co. 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151, was an action brought to recover several thousand dollars damages because the defendant negligently permitted game placed in cold storage during the closed season in violation of law to be destroyed. Recovery was denied. It was said that the law will not stultify itself by promoting on the one hand what it prohibits on the other, and will leave the parties where it finds them, unsanctioned by its favor and unaided by its process.

In *Oviatt v. Pond,* 29 Conn. 479, it was held that liquors kept for sale contrary to law are regarded by the law as having no lawful value or value for lawful purposes.

In *Crigler v. Shepler,* 79 Kan. 834, 101 Pac. 619, it was held that a person employed in a prohibition state to sell liquor contrary to law could not recover on his contract of hire.

Other cases of like tenor are *People v. Adams,* 176 N. Y. 351, 68 N. E. 636; *Collins v. Lean,* 68 Cal. 284, 9 Pac. 173; *Frost v. People,* 193 Ill. 635, 61 N. E. 1054; *Mullen v. Mosely,* 13 Idaho, 457, 90 Pac. 986, 12 L. R. A. N. S. 394; *Board of Police Comm'rs v. Wagner,* 93 Md. 182, 48 Atl. 455, 52 L. R. A. 775.

We do not wish to be understood as indorsing all that is said in the cases cited. What we do hold is that, where an article is useful and usable for gambling purposes only and gambling is unlawful and it is not shown that the article has any value except for use as a gambling device, courts will not regard such value as a legitimate measure of damages to be recovered where the article is destroyed. And where the implement has no value for any lawful purpose no damages in a case of this kind are recoverable. We think this rule is fairly within the principle of the decisions cited and that

it is in the line of good morals and sound public policy. The conclusion reached renders it unnecessary to discuss other questions raised in the case. The court should have directed a verdict for the defendant.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment dismissing the complaint.

GROSS, Administrator, Respondent, vs. ARIANS, Appellant.

April 11—April 29, 1913.

Deeds: Recital of consideration, etc., not a promise to pay: Evidence: Gift in fraud of creditors or others: Promise not implied: New trial: Sufficiency of motion.

1. **The mere recital of consideration in a deed, coupled with an acknowledgment of its payment, is some evidence of the amount paid, or to be paid, where the obligation to pay is admitted or otherwise proven; but it may not be evidence at all that the grantee promised to pay that sum.**
2. **Assent of the grantee to such a recital may be presumed from his acceptance of the deed, but he does not thereby admit that there was a promise on his part to make future payment.**
3. **Such a recital and the acknowledgment of payment are consistent with the idea that the conveyance was a gift by the grantor to defraud creditors or to hinder, delay, or defraud suitors out of their lawful actions; and the proposition is not controverted, but rather corroborated, by the facts that no note or other evidence of an existing debt was made by the grantee, and that he stated that he had bought the land for the amount named and had paid for it.**
4. **The supreme court, on appeal, may review the sufficiency of the evidence to support the verdict, although the motion for a new trial, made in the circuit court after verdict and before judgment, did not expressly ask that the verdict be set aside.**

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

The following statement of facts from appellant's brief seems correct and is not attacked by respondent's counsel:

"This is an action at law commenced by *Albin Gross* as administrator of the estate of Peter Gross, deceased, against *Anton Arians* to recover the sum of $11,000 and interest. It is alleged in the complaint that on the 18th day of February, 1908, Peter Gross was the owner of a farm in Sun Prairie and of twenty acres not connected with the farm, and that on the last named date he sold the same to *Anton Arians* for $17,000 and conveyed the same by warranty deed; that Peter Gross died intestate on the 29th day of April, 1908, and the plaintiff was appointed his administrator; and that the defendant, *Anton Arians,* never paid to the said Peter Gross nor to any one for him the said sum of $17,000 or any part thereof except $6,000; and the plaintiff demanded judgment for $11,000 with interest from February 18, 1908.

"The answer of the defendant admitted the representative character of the plaintiff and admitted the ownership in Peter Gross of the lands described in the complaint on the 18th day of February, 1908, and admits that on that date Peter Gross executed and delivered to the defendant a warranty deed of said lands, and admits that thereafter and after the death of said Peter Gross he assigned to the plaintiff a mortgage for the sum of $6,000, and denies each and every other allegation in the complaint contained, and especially denies that he ever promised to pay Peter Gross the sum of $17,000 or any other sum or any other valuable thing for the said lands, and denies that he was ever indebted to Peter Gross or to the plaintiff in any sum.

"The action was tried before a jury, resulting in a verdict for plaintiff for the sum of $11,824.24, and in a judgment for damages and costs in the sum of $11,924.90. The defendant moved for a new trial, which motion was denied by the court. And thereupon the defendant moved for a new trial on the ground of newly discovered evidence. Denied. The defendant appeals from the judgment and also from the denial of his motion for a new trial on the grounds of newly discovered evidence.

"Peter Gross was an unmarried man who had lived for some years in the village of Sun Prairie and owned this farm

and some other property. He had contracted the farm to Henry Miller and there was unpaid on the contract $14,000. The Miller contract did not cover the twenty acres which is also described in the deed, and for this twenty acres the defendant after the transaction received $1,200. Peter Gross had been accused of undue intimacy with the wife of Mr. Fiebeger. Mr. Gross expected to be sued by Fiebeger and was apparently very much alarmed at the prospect. On the 17th day of February, the day before the execution of this deed, he came to the office of Judge Jno. C. Fehlandt in Madison in the forenoon and asked Mr. Fehlandt to draw a deed of this property to *Anton Arians*. When asked to whom he wanted to sell his property, he said he wanted to give his property to *Anton Arians*. When asked for what consideration, he said for no consideration at all. He said he was going to give his farm to *Anton Arians*. In the afternoon of the same day he came to Mr. Fehlandt's office again in company with *Mr. Arians* and again stated that he wanted to give the property to *Mr. Arians,* and when it was suggested if he wanted to give it away he might give it to his brother *Albin,* he said his brother *Albin* should never have a cent of it. Mr. Fehlandt did not draw the deed, but told them he would the next day if Mr. Gross was still in the same frame of mind.

On the next day, February 18th, Peter Gross and *Mr. Arians* went from Sun Prairie to the village of Waterloo, Jefferson county. In the forenoon of that day *Mr. Arians* went to the office of M. W. Locke, an attorney, where he transacted some business not relating to this matter. After dinner of that day Peter Gross and the defendant, *Arians,* together went to the office of Mr. Locke. Mr. Gross produced a deed and abstract and made the request of Mr. Locke that he draw a deed to *Mr. Arians* of the land described in the deed and abstract. Such deed was drawn and was executed by Mr. Gross and the acknowledgment taken before Mr. Locke as a notary public. Mr. Gross handed the deed to *Mr. Arians* and told him to have it recorded. The abstract was handed back to Mr. Gross, he turned it over to *Mr. Arians.* Another paper was drawn, a contract which was given by Gross to *Arians* and afterwards returned by *Arians* to Mr. Gross.

"At the time of the execution of the deed there was no money paid by *Mr. Arians* to Mr. Gross. There was no note given and no mortgage given and nothing was said about payment, nor was anything said about the time of payment. This deed was brought on the next day to Madison by *Mr. Arians* and was put on record. Immediately after the execution of this deed Peter Gross left Sun Prairie and went to another state. Immediately after his departure an action was commenced by Mr. Fiebeger against Peter Gross, and both Mr. Miller and the defendant, *Anton Arians,* were garnished. Peter Gross died April 29th and these garnishments were dismissed on October 27, 1908.

"*Mr. Arians,* the defendant, sold the twenty acres for $1,200, and on the 9th day of November, 1908, deeded the farm to Mr. Miller and received $3,000 in money and two mortgages, one of $5,000 and one of $6,000. On the 3d day of December, 1908, the defendant assigned to the plaintiff administrator the $6,000 mortgage which he had taken from Mr. Miller on giving a deed of the farm and received from the plaintiff a receipt. This action was commenced February 21, 1911."

The following detail may be supplied: The deed contained these words: "For and in consideration of seventeen thousand (17,000) dollars, to him in hand paid by the party of the second part, the receipt whereof is hereby confessed and acknowledged, has given," etc. Appellant soon after the execution of the deed said to Miller that he had bought the land from Peter Gross and paid $17,000 for it. Appellant denies this, but we will assume for the purpose of this decision that he said so. The $6,000 mortgage was not assigned to the plaintiff in part payment of any debt confessed or admitted to be due, but without stipulation or treaty of any kind. The motive for so doing, as testified to by appellant, was to ease his conscience and escape the censure or win the approval of his neighbors.

Rufus B. Smith, for the appellant.

For the respondent there was a brief by *Aylward, Davies, Olbrich & Hill,* and oral argument by *M. B. Olbrich.*

TIMLIN, J. No equities of creditors are involved. There is no evidence that Peter Gross sold this farm to *Arians* or that the latter ever agreed to pay for it, except the recital of consideration paid in the deed, the alleged admission of *Arians* to Miller, and the assignment to the administrator of the $6,000 mortgage. These are each and all explained and avoided by other facts in the case. The testimony of Judge Fehlandt is entirely uncontradicted and is to the effect that Peter Gross on February 17, 1908, requested him to draft a deed of this property from him, Gross, to the appellant; that he wished to give this property to appellant because he expected to be sued—expected a lawsuit; that there was no consideration, and in substance that he desired to make a gift of the property to appellant. Being asked why, if he intended to give away his property, he did not give it to one of his brothers, he persisted in his desire to make a gift to appellant. Appellant was present. Judge Fehlandt refused to draw the deed, but told Gross to think of it over night and come the next day. The next day Peter Gross and the appellant went to the office of Mr. Locke, a lawyer at Waterloo, and there the deed in question was executed and delivered and the appellant immediately caused it to be recorded. There was nothing said about payment, no note or mortgage executed. Peter Gross left the state and the expected suit was commenced against him, and the appellant and others garnished. If the suit was of the nature described in the briefs of counsel it would probably abate by the death of Peter Gross; however, it was discontinued after his death. The declaration of appellant to Miller, if it was made, must be considered as made. It was not that he bought the land and owed for it, but that he bought the land and paid for it. The recital quoted from the deed is of the same character. While both, treated as declarations, are inconsistent with the notion of an ordinary gift *inter vivos,* they are in line with what would be ordinarily written or said in the case of a gift

by deed made to defraud creditors. Here the uncontroverted testimony of Judge Fehlandt comes in to throw light upon the whole transaction, and it is rather corroborated by the two items of evidence last above mentioned as well as by all the other facts of the case.

It is quite a serious thing to impose upon a man a contract which he never made. The mere recital of consideration in a deed, coupled with an acknowledgment of its payment, is some evidence of the amount of the consideration paid, or to be paid, where the obligation to pay is admitted or otherwise proven. But it may not be evidence at all that the grantee promised to pay that sum. That would depend upon other facts in evidence. Such recital presents nothing of a promise or contract, merely a declaration of the fact that this was the amount of the consideration, and the declaration is made by the grantor. *Jost v. Wolf,* 130 Wis. 37, 43, 110 N. W. 232.

The assent of the grantee may be presumed from his acceptance of the deed, but what did he assent to? Surely not that there was a promise on his part to make future payment. See, also, *McGiverin v. Keefe,* 130 Iowa, 97, 106 N. W. 369; *Mowrey v. Vandling,* 9 Mich. 39. The recital in this deed is not inconsistent with the notion of a gift to defraud creditors. We have used the word "creditors" because that describes the ordinary and best understood case, but the law is the same as regards gifts made to hinder, delay, or defraud suitors out of their lawful actions, etc. *Corry v. Shea,* 144 Wis. 135, 128 N. W. 892. The proposition, therefore, that the conveyance was a gift made by Peter Gross to hinder and delay the plaintiff in the then threatened action is in no degree controverted but rather corroborated by all the other circumstances in the case, including the recital of consideration and acknowledgment in the deed, there having been no note or other evidence of an existing debt made; and including the false statement of *Arians* to Miller that he bought

the land for $17,000 and paid for it. In such case the law leaves the parties just where they put themselves, and there is no promise implied to pay any other consideration than that agreed upon by and between the parties to the deed. The court instructed the jury:

"In considering the question whether Mr. Peter Gross did give this farm to *Mr. Arians,* it is the law that one may give his property to any one whom he pleases. If the evidence establishes the fact that Peter Gross did in fact make a gift of this farm to *Mr. Arians,* the plaintiff cannot recover."

The jury, however, apparently viewed the case from their standpoint of things as they ought to be rather than from that of things as they are. We must hold that there is no evidence to support the verdict holding the appellant upon a promise to pay Peter Gross for this land.

It is contended that, because in his motion for a new trial upon the minutes after verdict and before judgment the appellant did not expressly ask that the verdict be set aside, the sufficiency of the evidence to support the verdict cannot be reviewed in this court. This is too technical. A motion for a new trial so made could ordinarily be granted only by setting aside the verdict, and therefore the request made includes setting aside the verdict. We believe nothing contrary to this can be found in the decisions of this court.

It is not necessary to consider the appeal from the order denying a new trial on the ground of newly discovered evidence.

By the Court.—Judgment reversed, and the cause remanded for further proceedings according to law.

GANZER and others, Respondents, vs. ROSENFELD and another, Appellants.

April 11—April 29, 1913.

Foreign corporations: Resident officers: Fraudulent acts: Conversion of property: Action in courts of this state: Jurisdiction.

Stockholders and creditors of a foreign corporation which has its business office in this state may maintain an action in equity in the courts of this state against resident officers of the corporation to recover, on behalf of the corporation, corporate moneys converted by such officers, as well as moneys lost to the corporation by their fraudulent and negligent conduct.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Daniel H. Grady, for the appellants, contended, *inter alia,* that the subject matter of the action pertains to the internal management of the affairs of a foreign corporation, over which the courts of this state have no jurisdiction. Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be a stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation, and in the case of a foreign corporation our courts will not take jurisdiction. *North State C. & G. M. Co. v. Field,* 64 Md. 151, 20 Atl. 1039; 19 Cyc. 1236; *New Haven H. N. Co. v. Linden S. Co.* 142 Mass. 349, 7 N. E. 773; *Wason v. Buzzell,* 181 Mass. 338, 63 N. E. 909; *Kimball v. St. L. & S. F. R. Co.* 157 Mass. 7, 31 N. E. 697, 34 Am. St. Rep. 250; *Madden v. Penn E. L. Co.* 181 Pa. St. 617, 37 Atl. 817, 38 L. R. A. 638; *McCloskey v. Snowden,* 212 Pa. St. 249, 61 Atl. 796, 108 Am. St. Rep. 867; *Taylor v. Mut. R. F. L. Asso.* 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621; *Howard v. Mut. R. F. L. Asso.* 125 N. C. 49, 34 S. E. 199,

45 L. R. A. 853. The corporation not being licensed to transact business in Wisconsin and not having had twenty per cent. of its stock paid in nor one half thereof even subscribed, it could not maintain this action in the courts of this state. The action being one for the benefit of an alleged foreign corporation not complying with the laws of Wisconsin, it follows that the courts of this state have no jurisdiction of the subject matter; and as the corporation could not maintain the action in its own behalf upon the facts stated, an action on behalf of a stockholder for the benefit of the corporation cannot be maintained.

For the respondents the cause was submitted on the brief of *Grotophorst, Evans & Thomas.*

WINSLOW, C. J. This is an appeal from an order overruling a general demurrer to the complaint. The only serious question involved is whether stockholders and creditors of a foreign corporation, which has its business office in this state, may maintain an action in equity in the courts of this state against resident officers of the corporation to recover, on behalf of the corporation, corporate moneys converted by such officers, as well as moneys lost to the corporation by their fraudulent and negligent conduct. This question must be answered in the affirmative. It is doubtless true that the courts of a state will not assume to dissolve or regulate the internal affairs of a foreign corporation,—in other words, they will not exercise visitorial powers over such a corporation; but they may and will, in a proper case, require an accounting and restoration of property and money misappropriated or wasted by unfaithful officers who are within their jurisdiction. *Miller v. Quincy,* 179 N. Y. 294, 72 N. E. 116; *Richardson v. Clinton W. T. M. Co.* 181 Mass. 580, 64 N. E. 400; 19 Cyc. 1236–1238.

By the Court.—Order affirmed.

AMERICAN CEMENT MACHINE COMPANY, Appellant, vs. CITY OF MADISON, Respondent.

April 12—April 29, 1913.

***Municipal corporations:** Claims: Appeal from disallowance: Sufficiency of bond.*

1. Where a city charter requires one taking an appeal from the disallowance of a claim by the council to execute "a bond to the said city with sufficient surety . . . conditioned for . . . the payment of all costs that shall be adjudged against the appellant," a bond executed for a definite sum, if otherwise in accordance with the requirement, is a substantial compliance with the charter and sufficient to confer jurisdiction on the appellate court, provided the sum for which it is given is large enough to secure payment of any judgment for costs which, in the ordinary course, the city might obtain.
2. If, in such a case, an unusual contingency arises causing an amount of costs in excess of the bond to be incurred, recoverable by the city, the court, under sec. 4281*m*, Stats., may protect the city by requiring the appellant to give a new bond.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an appeal from an order dismissing an appeal taken by the *American Cement Machine Company* from the disallowance by the common council of the city of *Madison* of a claim filed by the plaintiff with the city clerk of the city. The appeal from the disallowance by the city council was taken, by the service of a proper notice, to the circuit court for Dane county, and a bond was filed with the city clerk to cover the costs of the action.

The city attorney moved for dismissal of the appeal upon the ground that the bond was not sufficient under the provisions of the city charter of the city of *Madison*. The charter provision governing such an appeal is sec. 28 of ch. VII of the charter and reads as follows:

"When any claim of any person against the city shall be disallowed in whole or in part by the common council, such

person may appeal from the decision of the council disallowing such claim to the circuit court of the county of Dane, by causing a written notice of such appeal to be served on the clerk of said city within twenty days after the making of such decision, and executing a bond to the said city with sufficient surety, to be approved by the said clerk, conditioned for the faithful prosecution of such appeal and the payment of all costs that shall be adjudged against the appellant by the court. . . ."

The part of the bond executed and filed in the action by the claimant which is material to this appeal is as follows:

"Know all men by these presents that we, the *American Cement Machine Company,* principal, and the Equitable Surety Company, surety, are held and firmly bound to the city of *Madison,* a municipal corporation of Wisconsin, in the sum of $500, lawful money of the United States, to be paid to the said city of *Madison* or its assigns, for which payment well and truly to be made, we bind ourselves and our assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 2d day of October, 1912. . . .

"Now the condition hereof is such that if the said *American Cement Machine Company* shall faithfully prosecute such appeal and pay all of the costs that shall be adjudged against the appellant by the court on said appeal, then this obligation shall be void, otherwise of force."

The lower court dismissed the appeal and the action on the grounds that the appeal bond did not comply with the requirements of sec. 28 of ch. VII of the city charter. This is an appeal from the order dismissing such appeal and the action.

For the appellant there was a brief by *Welton & Marks,* and oral argument by *C. E. Marks.*

William Ryan, for the respondent.

SIEBECKER, J. The appeal bond is assailed for want of its compliance with the charter provision prescribing the conditions for appealing from the disallowance of a claim against the city. The charter provisions conferring on the

claimant the right of appeal from the disallowance of a claim against the city require the service of a written notice of appeal on the city clerk and the execution of a bond with sureties conditioned for a faithful prosecution of the appeal and "the payment of all costs that shall be adjudged against the appellant by the court." The appellant executed a bond in the penal sum of $500 which was approved by the city clerk.

It is asserted that this bond is fatally defective in that the liability of the obligation is limited to $500, which it is claimed may prove insufficient to pay all costs for which appellant may be adjudged to be liable in prosecuting this appeal, and that the bond for this reason is not a substantial compliance with the charter provision. The charter specifically prescribes that the obligation shall be a bond. In its ordinary signification this means that a certain sum is to be specified expressing the obligation of the parties. The question naturally arises, Is a bond for a definite sum, like the one in question, within the contemplation of the charter provision, and, if so, is this bond a substantial compliance therewith? A bond, as ordinarily understood, implies that the obligors bind themselves to pay a certain sum upon condition that it shall be payable if it is breached. If the charter provisions permit that the bond required may be executed for a certain sum, then this bond is sufficient. In the case of *Conover v. Washington Co.* 5 Wis. 438, an appeal bond executed in the sum of $100 and conditioned that the claimant, who had appealed from the disallowance of a claim against the county to the circuit court, should faithfully "prosecute his said appeal and pay all costs that shall be adjudged against him," was held to comply with a statute requiring an appeal bond upon the same terms as the charter provisions in this case prescribe. The circuit court in that case dismissed the appeal for insufficiency of the bond; but on appeal to this court it was held that it substantially met the calls of the statutory requirements and was held to be sufficient. The de-

cision, obviously, was based on the principle that if such a bond was sufficient in amount to secure payment of all costs that would ordinarily and customarily be incurred by the county in such litigation, then it was a substantial compliance with the statute and thus conferred jurisdiction on the circuit court.

Can the bond in the instant case be so considered? As we have seen, it conforms to the statutory language in its conditions and no objection exists against it in that respect. The penal amount is fixed at $500. In the ordinary course of prosecuting this appeal this sum is sufficient to pay all costs to which the city would be entitled in the circuit court if appellant is unsuccessful in the prosecution of its claim. From the nature of the claim the amount of the bond will practically assure the city of the payment of any judgment it may obtain for costs in the circuit court. Under the circumstances a bond in that amount is a substantial compliance with the city charter and is sufficient to confer jurisdiction of the claim on the circuit court. It is suggested that some unusual exigencies might arise in the prosecution of the claim causing an amount of costs in excess of the bond to be incurred by the city and recoverable in the action. When such a contingency arises, the court is given power to inquire whether the bond has become insufficient, and, if found necessary, it can protect the city by requiring the appellant to give a new bond to indemnify it against any such threatened loss in the prosecution of the claim. See sec. 4281*m*, Stats. It is considered that the bond in question complies with the charter provisions; that it is sufficient; and that the court erred in dismissing the appeal and the action.

By the Court.—The order appealed from is reversed.

MADISON, Respondent, vs. CITY OF ANTIGO, Appellant.

April 12—April 29, 1913.

Municipal corporations: Injury from defective sidewalk: Notice of general bad condition: Contributory negligence: Questions for jury: Husband as witness for wife: Agency: Excessive damages.

1. Where a sidewalk is so decayed that a plank is liable to break at any time and that condition is observable by reasonable inspection, a city cannot, when a plank does break, escape liability for an injury caused thereby by saying that it had no notice of that particular defect. Actionable negligence is sufficiently shown in such a case if the jury can say under the evidence the break was due to the general bad condition of the walk.
2. Plaintiff, who was injured by stepping into a hole in a sidewalk, having testified that her attention was diverted at the time by a passing team of horses, the question of contributory negligence was one for the jury.
3. Where a married woman, injured by reason of a defect in a sidewalk, had requested her husband to investigate the condition of the walk and file a claim for her against the city, he was so far her agent as to be a competent witness in her behalf on those points.
4. Where a woman three months advanced in pregnancy fell upon a defective sidewalk and a miscarriage and other ill effects resulted, and there was evidence that she had suffered permanent injury, an award of $2,500 was not excessive.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *R. C. Smelker,* attorney, and *Geo. W. Latta,* of counsel, and oral argument by *Mr. Latta.*

For the respondent there was a brief by *Henry Hay,* attorney, and *Goodrick & Goodrick,* of counsel, and oral argument by *A. B. Goodrick.*

BARNES, J. This action was brought to recover damages for an injury sustained from a fall alleged to be due to a defect in a sidewalk. The defect claimed consisted of a broken

plank. The jury found (1) that the walk was defective; (2) that the defect existed for such a length of time that the defendant in the exercise of ordinary care should have discovered it and remedied it; (3) that the defect was the proximate cause of the injury; (4) that plaintiff was not guilty of any want of ordinary care which contributed proximately to her injury; (5) that plaintiff was damaged in the sum of $2,500.

The appellant insists that the evidence is insufficient to support the first, second, and fourth findings above referred to; that it was error to allow the plaintiff's husband to testify to the condition of the walk; that the court erred in answering a question in the special verdict which asked whether the plaintiff sustained injuries from her fall; and that the damages are excessive.

1. There is ample evidence in the record to support the finding that the walk was in a general condition of decrepitude and that there was a broken plank therein. The witnesses Armstrong, Zander, Treat, and the plaintiff's husband so testified. Counsel no doubt honestly believe that the defendant's witnesses were more truthful and therefore more credible than those produced by the plaintiff. Having failed to convince the jury of that fact and having further failed to convince the trial judge that in the interest of justice a new trial should be granted, this court must under the established rules of law allow the finding to stand, inasmuch as there is credible evidence to support it.

2. It is argued that if it be conceded that the walk was defective there was no evidence to charge the defendant with actual or constructive notice of the defect. There was evidence tending to show that the walk was old, decayed, and rotten; that the stringers were rotten, and that the middle one was considerably lower than the other two, and that an occasional new plank was put in to replace one that had become broken. The evidence was sufficient to warrant the

jury in finding that the walk was so decayed that a plank was liable to break at any time. Where a walk is in such a condition and that condition is observable by reasonable inspection, a city cannot escape liability when a board does break by saying it had no notice of that particular defect. If the jury can say under the evidence that the break was due to the general bad condition of the walk, that is sufficient. *McHugh v. Minocqua,* 102 Wis. 291, 296, 78 N. W. 478; *Green v. Nebagamain,* 113 Wis. 508, 511, 89 N. W. 520; *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816; *Grimm v. Washburn,* 100 Wis. 229, 75 N. W. 984; *Spearbracker v. Larrabee,* 64 Wis. 573, 25 N. W. 555; *Duncan v. Grand Rapids,* 121 Wis. 626, 99 N. W. 317.

3. It is further argued that the court should have held that the plaintiff was guilty of contributory negligence as a matter of law because she knew that the walk was in bad condition and there was nothing to prevent her from seeing the broken plank. She testified that when she reached the place where she was injured she was looking at a team of horses that was passing by, and that while her attention was thus diverted she stepped into the hole and fell. It is urged that there must be something more attractive than a team to divert attention in order to excuse failure to observe a defect in a walk. Clearly under the evidence the plaintiff's contributory negligence was a jury question. *Zoellner v. Fond du Lac,* 147 Wis. 300, 305, 133 N. W. 35; *Duncan v. Grand Rapids, supra.*

4. There was evidence from which the jury might infer that the plaintiff requested her husband to investigate the condition of the walk where she was injured and file a claim for her against the city. This was sufficient proof of agency to make the husband a competent witness on these points. *Smalley v. Appleton,* 75 Wis. 18, 43 N. W. 826.

5. The first question in the special verdict was: "Did the plaintiff receive physical injuries at the time and place de-

scribed in the complaint by reason of a fall upon the sidewalk?" The court answered this question "Yes." It is said that error was thereby committed. We have been unable to find any evidence in the record to negative the claim that she did fall and did receive some injury. There was no question for the jury to pass upon in reference to this matter. There was plenty of evidence to show that plaintiff fell and was injured.

6. The appellant claims that the damages awarded are excessive. The plaintiff testified that she was three months advanced in pregnancy at the time she fell and that the fall produced a miscarriage. Physicians corroborated this evidence. Plaintiff further testified to a large category of ill effects produced by the fall, and she is to some considerable extent corroborated by her physicians in reference to these claims. Two of the physicians testified that plaintiff suffered permanent injury from her fall. The trial court did not see fit to disturb the verdict on the question of damages, and we cannot say that it is beyond the bounds of reason, assuming the testimony most favorable to the plaintiff in reference to the character of the injuries to be true.

By the Court.—Judgment affirmed.

CORRIGAN, Respondent, vs. CITY OF ANTIGO, Appellant.

April 12—April 29, 1913.

Municipal corporations: Injury from defective sidewalk: Evidence: Sufficiency.

In an action against a city for personal injury sustained by reason of an alleged defective sidewalk, findings by the jury to the effect that the walk was insufficient for public travel, that defendant was charged with notice of its insufficiency, and as to the damages, are *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action to recover damages for a personal injury sustained by reason of an alleged defective sidewalk on one of the principal streets in the city of *Antigo*. The walk was made of hemlock planks two inches thick and six inches wide, laid crosswise upon three stringers. Between 8 and 9 o'clock on the evening of May 20, 1911, the plaintiff, in company with one Mrs. Bomke, started up town to do some shopping. The plaintiff was on the inside of the walk and Mrs. Bomke on the outside. When opposite a place called Hull's, Mrs. Bomke stepped on a plank that broke under her heel and caused the end on the inside of the walk to tip up and trip the plaintiff, who fell to the ground and received the injuries complained of. The jury found (1) that the place where plaintiff was injured was insufficient for public travel; (2) that the officers of the city of *Antigo*, charged with the immediate duty of attending to such matters, had notice of such insufficient condition for a sufficient length of time to have repaired the walk before the accident, by the exercise of reasonable diligence; (3) that the defect existed long enough before the accident to enable the defendant, by the exercise of ordinary care, to discover and remedy it; (4) that the insufficient condition of the walk was the proximate cause of the plaintiff's injuries; and (5) damages in the sum of $1,500. From a judgment in favor of the plaintiff entered upon the special verdict the defendant appealed.

For the appellant there was a brief by *R. C. Smelker*, attorney, and *Geo. W. Latta*, of counsel, and oral argument by *Mr. Latta*.

For the respondent there was a brief by *Goodrick & Goodrick*, and oral argument by *A. B. Goodrick*.

VINJE, J. The defendant attacks the verdict (1) because the evidence does not sustain the finding that the walk was

insufficient for public travel; (2) because the defendant was not charged with notice of its insufficiency; and (3) because the damages are excessive. We have carefully examined the evidence, and as to each contention the result of the examination is adverse to the defendant. The findings complained of are not only sustained by credible evidence, but seem to be based upon a preponderance thereof. A verdict will not be set aside if there is any credible evidence to sustain it. *Beyer v. St. Paul F. & M. Ins. Co.* 112 Wis. 138, 88 N. W. 57; *Smith v. Reed,* 141 Wis. 483, 124 N. W. 489. Since the jurisprudence of the state would not be enriched by a statement of the evidence sustaining the verdict, none will be made.

By the Court.—Judgment affirmed.

M. D. WELLS COMPANY, Respondent, vs. RAYWORTH, Appellant.

April 12—April 29, 1913.

Sales: Warranty: Evidence as to market price.

In an action for the purchase price of goods,—the issue being whether they were bought as first-class goods with a warranty of quality, as claimed by defendant, or were bought at a discount from the market price with the understanding that they were a job lot of damaged goods, as plaintiff claimed and testified,—it was error to exclude evidence as to the value and market price of first-class goods of that kind at the time of the sale, offered by defendant for the purpose of contradicting plaintiff's claim and testimony and showing that the sale price was the full market price.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action to recover the purchase price of a quantity of rubbers. The defendant by answer admitted the sale

and delivery of the rubbers at the prices claimed, but alleged by way of defense and counterclaim that the plaintiff warranted the rubbers to be of first quality and that the boxes contained the sizes marked thereon, but that said warranties were both breached and the rubbers worthless, and damages were demanded for breach of the warranties. By reply the plaintiff denied the making of any warranty, and alleged that the rubbers were bought as a job lot of damaged goods, at fifteen per cent. discount from regular prices. The jury returned a general verdict for the plaintiff for the purchase price of the rubbers, and the defendant appeals.

For the appellant there was a brief by *H. F. Morson,* and oral argument by *A. K. Stebbins.*

For the respondent the cause was submitted on the brief of *Kemper, Bloodgood & Kemper.*

WINSLOW, C. J. The issue here was simple, namely, whether the rubbers were bought as first-class goods with a warranty of quality, as defendant claims, or whether they were bought at a discount from the market price, with the understanding that they were a job lot of damaged goods, as the plaintiff claims. The plaintiff introduced evidence tending to prove that the goods were a job lot of broken sizes, known to be such by the defendant and bought by him at his own risk at fifteen per cent. reduction from the regular price, because they were a job lot. The defendant, after proving the defective character of the rubbers, testified that he negotiated with the plaintiff's salesman for first-class rubbers, and bought them under a warranty that they were first class; that the salesman first asked $1.65 for them, and defendant told him he could buy first-class rubbers for from $1.52 to $1.57, and finally the salesman offered him fifteen per cent. discount, and he took them. The defendant then offered to prove by persons familiar with the business what the value and market price of first-class rubbers was at the time of the purchase, and what the rubbers would have been worth if they had been

of the quality which defendant claimed they were warranted to be. The purpose of this testimony so offered was to contradict the plaintiff's claim that the goods were in fact sold at fifteen per cent. reduction from the market price, and show that the regular fixed market price of rubbers of first-class quality at the time of the purchase was no more than the price at which the rubbers were bought. This testimony was rigidly excluded by the trial judge, and the ruling was clearly erroneous and must have been prejudicial. The principal fact relied upon by the plaintiff to establish its contention was the fact that the goods were sold at a cut price. If it was a fact, as claimed by defendant, that they were sold at or about the regular market price, the defendant's case would have been greatly strengthened.

For the exclusion of this evidence there must be a new trial. The court charged the jury that it was undisputed that the defendant received a discount of fifteen per cent. on the goods. This was true under the evidence received, because of the exclusion of the evidence above referred to. If on a new trial there should be evidence tending to show that the sale price was in fact the market value of such goods at the time, such an instruction would be erroneous and should not be given.

By the Court.—Judgment reversed, and action remanded for a new trial.

IMPERIO and another, Plaintiffs in error, vs. THE STATE, Defendant in error.

April 12—April 29, 1913.

Appeal: Questions considered: Criminal law: Homicide: Justification: Aiding and abetting: Degree of offense: Review on appeal: Evidence: Verdict: Impeachment: Affidavits of jurors.

1. In general, an assignment of error which is not deemed by counsel to be of sufficient importance to warrant argument will be passed as inconsequential.

2. The fact that an officer does not act technically within his rights in making an arrest without warrant, furnishes no justification or excuse to the persons arrested, having knowledge of his official character, for committing a homicide in order to effect an escape.
3. Where two persons fleeing together from arrest were apprehended by an officer, and while being held in custody one, in an attempt to escape, drew a revolver and fired upon and killed the officer, while his companion, evidently knowing his purpose, actively aided in effecting it although he used no weapon, there was no error in instructing the jury not to convict the latter of any less offense than the one who fired the fatal shot.
4. If there is any evidence in a criminal action warranting submission of the question of defendant's guilt to the jury, it will suffice on appeal to support a conviction.
5. Affidavits of jurors, except as to matters outside the jury room or some mistake in framing the verdict so that it does not correctly report what was agreed upon, cannot be used as a basis for setting the verdict aside.
6. Under no circumstances can a juror be permitted to impeach a verdict by affidavit to the effect that while he understood the effect of the verdict he did not, when he agreed thereto, believe it was right.

ERROR to review a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

The accused were informed against as having, on the 6th day of July, 1911, at Vilas county, Wisconsin, killed John Radcliffe, pursuant to a premeditated design to effect his death. In due course, they were tried, resulting December 23, 1911, in a verdict of guilty of the full offense charged and judgment accordingly was rendered, which is now sought to be reviewed.

Frank P. Regner, for the plaintiffs in error.

For the defendant in error there was a brief by the *Attorney General, George E. O'Connor,* district attorney, and *M. B. Rosenberry,* assistant district attorney, and oral argument by *Mr. O'Connor* and *Mr. Rosenberry.*

MARSHALL, J. The evidence established, or tended to establish, these facts: July 5, 1911, the accused, *Antonio Im-*

perio, kept a house of ill repute for his brother, in Oneida county, and was informed by the sheriff that some trouble was in prospect because of a particular woman harbored there, brought to the place by the accused, *Philippi Roberti.* Thereupon the latter and *Imperio* departed to leave the state. The same day a warrant was issued to apprehend *Imperio* for keeping a house of ill-fame and a warrant was also issued to apprehend *Roberti* for an offense of somewhat similar grade. The undersheriff, with the warrants, made unsuccessful search for the accused and, being satisfied that they had fled from the county and were probably somewhere in the adjoining county of Vilas, telephoned John Radcliffe, the sheriff of that county, to take them into custody if found there, informing him of the warrants for their apprehension. Up to the time they were finally apprehended, they were endeavoring secretly to flee from this state into the state of Michigan, going sometimes on foot, sometimes by automobile, and sometimes by horse and carriage, stopping sometimes at a hotel and sometimes at a place or places of ill-fame. Upon the Vilas county sheriff being requested as aforesaid, taking one Carter and one Hansen as assistants, he went to the near-by village of Conover, explaining on the way, the purpose of the journey. Soon after arriving there, the three came upon the accused seated together upon a bench in front of the village hotel. Radcliffe immediately informed them of his official character and took them into custody. Thereupon he left them in charge of his assistants while he went to write the sheriff of Oneida county of the situation. In the meantime the accused were further assured that he was the sheriff of Vilas county and they conversed together, more or less, in the Italian language. Upon Radcliffe returning, *Imperio* induced him and his assistants to remove from the position in front of the hotel a short distance, *Roberti* accompanying and the two conversing in the Italian language in an excited manner. After the change of location, *Imperio* demanded to

have the warrant read to him and, upon finding that Radcliffe had none, he denied the latter had any right to hold him. Upon his giving additional evidence of an intention to resist further detention, Hansen commanded him to throw down any weapon he had and a search of *Roberti* was commenced by Radcliffe. *Imperio* interfered and quickly drew a revolver and commenced discharging it. Radcliffe's two assistants made efforts to protect him and *Roberti* was active to prevent them from doing so. Soon Radcliffe fell from the effect of a bullet wound inflicted by *Imperio* and quickly died. Hansen was struck by two or more of the bullets. *Imperio* did not cease using his weapon until some seven shots had been fired and it was evident to him and his associate that they had, for the time being, overcome their captors. They then fled from the place. Shortly thereafter they were apprehended in the woods under such circumstances as to indicate that they had ceased efforts to escape. There was also evidence tending to show that *Roberti,* as well as *Imperio,* had a revolver and that, between them, they were armed with a butcher knife.

On the case thus made, by a permissible view of the evidence, the theory of the state was that the accused conspired to escape from custody, thinking that Radcliffe had no right to detain them without a warrant, and to use their weapons to that end with fatal effect, if necessary, and that when *Imperio* commenced shooting, *Roberti* knew his purpose and interfered with the efforts of Radcliffe's assistants to protect him in order to aid in executing such purpose, which included, as indicated, killing Radcliffe, if necessary to effect the escape.

It does not seem advisable to refer, in detail, to the multitude of errors assigned on behalf of plaintiffs in error. The great majority are submitted without argument. In that manner substantially the whole of a quite lengthy charge is divided up into sections and we are asked to review and pass upon it. In general, an assignment of error which is not deemed by counsel to be of sufficient importance to warrant

something more than a mere raising of a question for consideration, will be passed as inconsequential.

We have examined the alleged errors submitted with argument, as well as those submitted without argument, sufficiently to discover that there is no efficient merit in them and little which calls for discussion to support the conclusion to which we have arrived. Nothing is advanced in the printed, and nothing was on the oral, argument constituting any justification for the homicide. There was ample evidence to warrant the jury in deciding that the accused knew the deceased was acting officially in taking them into custody. So if the sheriff did not act, technically, within his rights, that gave the accused no justification or excuse whatever for the homicide.

Complaint is made because the jury were instructed not to convict *Roberti* of any lesser offense than *Imperio*. Reliance is placed upon *Miller v. State,* 139 Wis. 57, 119 N. W. 850. The principle of that case does not have any application to the facts here. The evidence, now, indicates, without room for fair controversy, that the two men acted in concert from before the first shot was fired and that *Roberti* must have known *Imperio's* purpose and aided in effecting it. Under the circumstances, it was immaterial who handled the weapon which did the mischief. One was, necessarily, as guilty as the other.

The principal argument on the merits of the case is in support of a claim that the evidence did not warrant finding *Roberti* guilty of murder in the first degree. On that, it does not seem to be appreciated, that, if there was any evidence warranting submission of the question to the jury, there is enough to support the finding on appeal. Such matter cannot turn on a mere preponderance of the evidence. The jury had a right to reject the story of the accused persons and believe that of the survivors of the encounter. Accepting the verdict, as we must, as to the truthfulness of the testimony of such survivors, the substance of which appears in the statement, there is no reasonable explanation of *Imperio's* conduct

other than that he intended to commit the homicide when he fired into the person of Radcliffe and that his codefendant was acting in concert with him at that time.

Complaint is made because the trial court refused to grant a new trial as to *Roberti* upon the affidavits of some jurors impeaching their verdict. That assignment of error is ruled in favor of defendant in error by the familiar principle that affidavits of jurors, except as to matters outside the jury room or some mistake in framing the verdict so as to report what was agreed upon, cannot be used as a basis for setting the verdict aside. Only within quite narrow limits can a juror impair his verdict by affidavit or anything he may say or do after having been discharged from the case. Under no circumstances can he be permitted to efficiently contradict it, as was attempted in this case, by confessing that he appreciated the effect thereof as rendered but did not, when he agreed thereto, believe it was right. *Hempton v. State,* 111 Wis. 127, 86 N. W. 596; *Wolfgram v. Schoepke,* 123 Wis. 19, 100 N. W. 1054. An affidavit to the effect that the verdict as reported is not as agreed upon and an affidavit directly impeaching the verdict, as that the juror united in delivering a particular verdict, but did so contrary to his best judgment, are quite different. The latter is not permissible. *Butteris v. Mifflin & L. M. Co.* 133 Wis. 343, 113 N. W. 642.

There does not seem to be any other matter mentioned by counsel for plaintiffs in error requiring special mention. As before indicated, notwithstanding many matters, suggested, might properly have been passed without attention because of their being a mere claim of error, on account of the importance of the case and the earnestness of its presentation for plaintiffs in error on the oral argument, we have examined all the complaints sufficiently to discover whether there is any real merit therein which could form a legitimate basis for disturbing the judgment as to either of the accused, and do not find any.

By the Court.—The judgment is affirmed.

O'TOOLE, Respondent, vs. DULUTH, SOUTH SHORE & ATLANTIC RAILWAY COMPANY, Appellant.

February 18—May 14, 1913.

Railroads: Injury to person at highway crossing: Contributory negligence: Failure to look and listen: "Slight want of ordinary care:" Questions for jury.

While crossing railway tracks on a highway, plaintiff's cart was struck by an engine and he was injured. He had dumped a load at a point about ninety feet away, and before starting back toward the crossing had looked down the track, along which he could see 500 or 600 feet in the direction from which the engine came, but saw nothing. He knew that a passenger train was due at that time. He then drove along a road parallel with the tracks and did not look again for a train until he had turned and was upon the crossing. He wore a cap which covered his ears, and did not hear a fellow workman who saw the engine and called to him to stop. *Held* that, as a matter of law, he was guilty of more than a "slight want of ordinary care" contributing to the injury, within the meaning of sub. 6, sec. 1809, Stats. (Laws of 1909, ch. 332), and that a recovery was barred. TIMLIN, J., WINSLOW, C. J., and KERWIN, J., dissent.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

This is an action to recover damages for personal injuries suffered by the plaintiff while crossing the defendant's railway tracks on a highway in the unincorporated village of Iron River in Bayfield county.

On March 2, 1911, the plaintiff started work for the Iron River Lumber Company, hauling wood with a team and dump-cart from the mill of the company to the wood-yard. The mill was located on the east side of defendant's tracks, about 600 feet from the crossing, and the wood-yard where the loads were dumped was about 100 feet beyond the crossing, on the other side of the tracks and a short distance therefrom. About 8 o'clock on the morning of March 4th the plaintiff had taken a load of wood from the mill across the

tracks to the wood-yard, and, after having turned the team around so that they were headed toward the crossing, he stopped his team and dumped his load. He testified that when about ninety feet from the crossing, before starting his team, he looked down the track, along which he could see at least 600 feet, and saw no train or engine in sight. He then proceeded toward the crossing, along the road, which for some distance before reaching the crossing was parallel to the tracks, and, when he had gotten upon the crossing and it was too late to turn the team or stop it, he saw an engine coming toward the crossing and only a short distance from him. He whipped up his team in an attempt to get across the tracks. He was not successful, and the back end of the cart was struck by the engine, the plaintiff was thrown from the cart between the horses and the cart, and sustained the injuries for which he seeks damages.

There was conflicting evidence as to whether or not the whistle and bell were sounded and as to the speed of the engine. A fellow workman of the plaintiff saw the engine coming and called to the plaintiff to stop, but he was unable to make himself heard by the plaintiff. There was a dispute as to whether or not the crossing was a public highway. It was in evidence that the plaintiff did not look for a train or engine coming on this track, from the time he started his team after having dumped his load of wood until he had driven onto it. The engine was coming down grade with the steam shut off from the engine, and under such conditions the engine makes but little noise. The plaintiff knew that a passenger train was due at the time of the accident.

The jury found that the crossing was a public highway; that the engine was being run at an excessive speed; that the whistle was not sounded and the bell was not rung so as to give warning to travelers on the crossing; that there was a want of ordinary care on the part of the defendant in running the engine at the speed it did and in failing to give warning

to travelers; that this failure to exercise ordinary care was the proximate cause of the accident; that the plaintiff was guilty of a want of ordinary care in failing to look and listen before driving onto the crossing; and that the plaintiff's conduct in approaching and driving onto the track constituted no more than a slight want of ordinary care which proximately contributed to produce his injuries.

This is an appeal from the judgment awarding the plaintiff $1,000 as his damages, and his costs.

For the appellant there was a brief by *C. F. Morris,* attorney, and *A. E. Miller,* of counsel, and a reply brief signed by *A. B. Eldredge,* of counsel, and the cause was argued orally by *Mr. Eldredge.*

For the respondent there was a brief by *Ernest Sauve* and *A. W. McLeod,* and oral argument by *Mr. McLeod.*

The following opinion was filed March 11, 1913:

SIEBECKER, J. The jury found that the defendant was guilty of negligence in failing to give warning of the approach of its engine to the grade crossing, over the highway in question; that such negligence was the proximate cause of plaintiff's injuries; and that plaintiff's omission to look and listen for an approaching locomotive, when he should have done so, was, under the circumstances and conditions, a want of ordinary care which proximately contributed to cause him the injuries complained of, but that this culpability on his part was no more than a slight want of ordinary care. The court held that the plaintiff was entitled to judgment on the verdict for the recovery of the damages found by the jury.

The appellant assails the judgment on the ground, among others, that the evidence shows as matter of law that plaintiff, in omitting to look and listen for trains and engines while driving toward and onto the crossing, when one of defendant's engines, running light, was approaching it, was guilty of more than a slight want of ordinary care. The facts show-

ing the conditions surrounding this crossing, plaintiff's relation thereto, and his conduct in approaching and driving onto it, are practically undisputed. There is no room for controversy concerning plaintiff's ability to see and hear the engine approaching the crossing while he was driving on the road, which is about fifteen feet from and parallel to the railroad track, for the distance of ninety feet before he turned to cross the track. Plaintiff testified that before starting his team he looked and listened for trains at the place he dumped his load, which was a point ninety feet from the crossing; that he did not hear or see a train within his field of observation, which extended about 500 feet along the railroad track in the direction from which the engine that struck him came; that from the time he started on his course of travel from this point he did not again look for an approaching train or locomotive; that he heard or saw none until he had turned in his course and his horses' front feet were on the track, when he heard and observed this engine about 200 feet away; and that he then made his best efforts to cross and clear the track before the approaching engine should reach him. He admits that nothing at any time obstructed his view from seeing this engine at a point from 500 to 600 feet distant, after he dumped his load, to the time he drove onto the track; and that he did not look or listen for an approaching train or engine. It also appears that the accident occurred on a cold winter morning; that plaintiff wore a cap, which, he states, covered his ears; and that another driver followed him with a team at some distance and observed the approaching engine and before the plaintiff drove onto the track tried to warn him of its approach by "hollering" to him, but did not succeed.

Under the provisions of ch. 332, Laws of 1909, can it be said that such contributory negligence of the plaintiff, proximately causing his injuries, was a "slight want of ordinary care"? It must be considered that the language employed in this act was used in its ordinary and usual legal sense, and

that the words, a "slight want of ordinary care," mean that degree of care to which the terms are applied in the laws and decisions of the courts of this state. Viewing the plaintiff's conduct, in driving onto the railroad track as he did, in the light of the established adjudications on the subject, we are led to the conclusion that it shows, as matter of law, negligence of a higher degree than a "slight want of ordinary care." In *Schilling v. C., M. & St. P. R. Co.* 71 Wis. 255, 37 N. W. 414, 40 N. W. 616, conduct of this nature was involved, and the court speaks of it as follows:

"Can we say that an ordinarily prudent man, with the same knowledge of the time when the train was due, and having lived so near the railroad at that place so long a time, would not have looked or listened before crossing the track? He took no precaution, and used no means whatever, to avoid the danger. *He used no care and exercised no prudence whatever.* [Italics ours.] He might as well have been blind and deaf."

Dohr v. Wis. Cent. R. Co. 144 Wis. 545, 129 N. W. 252.

In *Brown v. C. & N. W. R. Co.* 109 Wis. 384, 85 N. W. 271, where the plaintiff drove his horse and buggy into the danger of an approaching train, a similar case was presented to the court. The court said:

"The evidence is perfectly clear that the deceased had ample opportunity to discover the danger which resulted fatally to him, and that he drove his horse recklessly into it. He did not make any attempt to discover the coming train, though it must have been in sight when he was at least forty feet from the crossing. The evidence shows one of the most reckless attempts to cross a railway track, regardless of the danger which it in law and in fact suggests, that can be found in the books."

In *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 82 N. W. 295, the court adverts to the negligent character of the conduct of a person in failing to look and listen for trains before attempting to pass over grade crossings, and holds it to be

inexcusable as matter of law. It is well established by the foregoing and many other adjudications on the subject, which need not be enumerated here, that the plaintiff's culpability, under the undisputed facts, is so obvious that it must be ruled as a question of law that he was guilty of a want of ordinary care which exceeds in culpability a "slight want of ordinary care," and in its magnitude and gravity, when viewed in the light of the impending perils of approaching trains and engines at such crossings, approaches the point of no care and of reckless conduct. It is suggested by respondent that the rights of the parties are controlled by sec. 1809, Stats. (1898), as amended by ch. 653, Laws of 1911. The accident happened on March 4, 1911. This statute went into effect the following July 13, 1911. The rights of the parties were fixed before the passage of this law, and hence are not affected by its provisions. See *Clemons v. C., St. P., M. & O. R. Co.* 137 Wis. 387, 119 N. W. 102. We are constrained to hold that the jury's finding, that plaintiff was guilty of a "slight want of ordinary care," is not in accord with the undisputed evidence; that the evidence, as matter of law, establishes a higher degree of culpability than a "slight want of ordinary care;" and that the court erred in awarding the plaintiff judgment in the case.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to dismiss the complaint.

TIMLIN, J. (*dissenting*). By ch. 332, Laws of 1909, it was provided that in actions for death or personal injuries caused by the negligent omission of a railroad company to comply with the requirements of sec. 1809, the fact that the person injured or killed was guilty of a slight want of ordinary care contributing to the injury or death should not bar a recovery. "The burden of proof that the person so injured

or killed was guilty of more than slight want of ordinary care contributing to the injury or death shall be upon the railroad company or corporation operating such railroad."

This statute was passed after more than half a century's experience in deciding such cases under rules of contributory negligence established and upheld by the court. It is apparent that such rules were not satisfactory and did not promote the cause of justice as justice is now understood. Therefore the proper legal representatives of the people of this commonwealth undertook, as they lawfully might, to change the law as it formerly existed. I think it was our duty to recognize this change in the instant case, which is governed by the statute referred to. I think it was error to reverse the verdict of the jury in the instant case on the question of fact involved and pronounce as matter of law upon the degree of want of ordinary care exhibited by the plaintiff in approaching and crossing the railroad track. Especially is this true where the burden of proof is by statute quoted upon the defendant. This statute could be given a just and equitable construction so as to soften the rigor of the ancient law and protect the railroad companies. I regret that this was not done. An intelligent recognition of the fact that the legislature has the right to make such changes and that the old decisions of this court on such questions did not satisfy the present-day notion of right and justice would go far to increase confidence in the courts. Whether or not there is shown on the part of the plaintiff a lack of ordinary care contributing proximately to cause his injuries is fundamentally a question of fact. Certain artificial rules relative to railway crossing accidents were established by the courts at an early day in response to the demands of justice as it was then understood and in vindication of a derivative common law governing the case. These were well enough so long as accepted and acquiesced in, but when the legislature undertakes to change

the law and does so moderately, I think it is the duty of this court to accept the change cheerfully and with alacrity so long as this change is within the power of the legislature.

Since the injury in question the law has been changed again by ch. 653, Laws of 1911, so that nothing short of gross negligence on the part of the person injured shall bar a recovery, and the burden of proof to show that the person injured or killed was guilty of gross negligence contributing to the injury or death is cast upon the railroad company. I am afraid it will be very hard to administer the law justly under this latter statute, but what can the legislature do when its moderate efforts to make a change in the interest of justice are disregarded?

Assuming that this locomotive engine was traveling at the rate of twelve miles an hour and that it omitted the statutory signals, a mere lack of attention for half a minute before entering on the track would bring about the collision. The locomotive was not in sight for more than half a minute before it struck the plaintiff. The plaintiff was negligent as found by the jury, but it is purely a question of fact whether or not such negligence exceeded a slight want of ordinary care, and that question should not be determined by considering the adjectives used twenty or thirty years ago in writing the opinions of this court.

Believing that an injustice has been done to the plaintiff and an unwarrantable interference with the verdict indulged in, I respectfully dissent from the majority opinion.

Chief Justice WINSLOW and Mr. Justice KERWIN concur in this dissent.

A motion for a rehearing was denied, with $25 costs, on May 14, 1913.

SMITH, Appellant, vs. WINNEBAGO REALTY COMPANY, Respondent.

February 18—May 14, 1913.

Master and servant: Injury from unguarded shaft: Evidence: Sufficiency: Concurrent neglect of fellow-servant: Appeal: Mandate: Proceedings after reversal.

1. In an action for injury sustained by plaintiff while working in defendant's planing mill, the evidence—which tended to show, among other things, that in the discharge of his duty plaintiff got down on his knees under a lath machine to clear out a blower pipe, and while so engaged the machine was started by another employee; that as plaintiff raised himself up to get out of the way his sleeve was caught by the nut or burr on the end of the shaft upon which the saws were located, and was wound up so that his arm went into the saws; that as he raised himself up his arm came over to the end of the shaft and he knew the burr caught him because he felt a jerk and twist from it; and that there were sharp and jagged leaves of metal curled up on the burr, caused by the use of a cold chisel in taking off and tightening it—is *held* sufficient to sustain findings by the jury that plaintiff's arm was drawn into the saws in consequence of his clothing being caught by the jagged surface of the burr, and that defendant's failure to securely guard the end of the shaft was the proximate cause of the injury.
2. Since, under the circumstances, the injury would not have happened but for the failure to guard the shaft, the fact that negligence of a fellow-servant concurred will not defeat recovery.
3. Where the trial court, because it changed answers in the special verdict and rendered judgment for defendant, did not pass upon defendant's alternative motion for a new trial nor a motion that the damages be reduced, this court, upon reversing the judgment, remands the cause with directions to consider and determine whether a new trial should be granted, and, if not, whether the damages were excessive.

APPEAL from a judgment of the circuit court for Price county: MARTIN L. LUECK, Judge. *Reversed.*

This action was brought to recover for personal injury sustained in September, 1909, by plaintiff while engaged in de-

fendant's planing mill, which injury resulted in the loss of plaintiff's right arm and other injuries.

In defendant's mill was machinery used for the purpose of manufacturing patent lath, which consisted in part of a shaft with a couple of small saws thereon located about three and three-fourths inches from the end of such shaft, on the end of which shaft was a nut or burr having a rough, jagged surface caused by turning the nut on and off with a cold chisel. The claim of the plaintiff is that his shirt was caught on this burr or nut and wound onto the shaft and he was drawn against the saws and his arm cut off. The claim of negligence is that the defendant failed to securely guard or fence the burr end of the shaft. The answer was a general denial. The jury returned the following verdict:

"(1) Was the plaintiff's arm drawn into the saws in consequence of his clothing being caught by the jagged surface of the burr? *A.* Yes.

"(2) Was the end of the lath-machine shaft which held the burr so located as to be dangerous to employees in the discharge of their duties? *A.* Yes.

"(3) Was it practicable, in the operation of the lath machine, to securely guard the end of the shaft that held the burr? *A.* Yes.

"(4) Did the defendant fail to exercise ordinary care in failing to securely guard the end of the shaft? *A.* Yes.

"(5) Was the failure of the defendant to securely guard the end of said shaft the proximate cause of the plaintiff's injury? *A.* Yes.

"(6) Did any want of ordinary care on the part of the plaintiff contribute proximately to produce his injury? *A.* No.

"(7) Was the injury to the plaintiff caused wholly by negligence on the part of John Hanson, the operator of the machine? *A.* No.

"(8) What sum of money will compensate plaintiff for the damages sustained in consequence of the injury suffered by the plaintiff? *A.* $12,500."

The plaintiff moved for judgment on the verdict, which

was denied. On motion of defendant the court changed each of the answers to questions 1 and 5 from "Yes" to "No" and ordered judgment in favor of defendant upon the verdict as changed, dismissing the complaint on the merits with costs. Judgment was rendered accordingly, from which this appeal was taken.

W. K. Parkinson, for the appellant.

For the respondent the cause was submitted on the brief of *Holland & Lovett.*

The following opinion was filed March 11, 1913:

KERWIN, J. Error is assigned because the court below changed the answers of the jury to questions 1 and 5 of the special verdict. It is insisted on the part of the appellant that the answers to these questions are supported by the evidence, therefore the court committed reversible error in changing them. At the time of the injury the plaintiff was fifty years of age and had worked about machinery in mills for many years, but had never worked at a matcher machine until about two days before the injury. The matcher machine stood east and west in the mill, was about sixteen feet long, and used for dressing and surfacing boards. At the east end of this machine was a movable receiving table about sixteen feet long, on which the boards passed after going through the machine. The machine was operated by two men, one at the west end feeding the boards into the machine, and the other at the east end, called the helper, who took the boards away as they came out of the machine. At the east end of the machine was what is known as a patent lath attachment, which consisted of an arbor about thirty-three and one-half inches long, and held in place in an oblique position, north and south, the south or pulley end being twenty-two and the north end thirty-three inches from the floor. On this arbor saws were put as needed, being passed over the north end of the shaft and held in place by collars and a nut screwed on the

end of the shaft. The patent lath attachment was seldom used, and when not in use the saws were removed and the arbor disconnected from the power. To the south of the arbor was a blower pipe, the mouth of the pipe being somewhat south of the saws as located on the arbor. The blower pipe was operated by a fan and designed to suck up sawdust and other refuse made by the lath saws or matcher. When lath were being made it was the duty of plaintiff to stand at the east end of the receiving table and take away the boards that came through the matcher and lath attachment and to keep the blower pipe from clogging, and when necessary reach in and free the pipe from obstruction. Plaintiff had been working about the matcher only two days before the injury and at the lath machine only about half an hour. Shortly after starting the machine a board slivered as it went from the matcher into the lath attachment and the machine was shut down to remove the slivers. The plaintiff, as helper, took out the slivers and then proceeded to examine the blower, which did not work. He stooped down under the lath attachment, and while brushing away the sawdust from the mouth of the blower pipe the feeder started the machine. The plaintiff was injured while getting out from under the lath attachment after the machine had started. The saws, two in number, were near the north end of the shaft and one and one-half inches apart. The shaft was one and one-fourth inches in diameter and about thirty-three inches in length. The saw nearer the burr on the north end of the shaft was six and the other eight inches in diameter. Between the burr end of the shaft and the smaller saw there were two collars, the one adjoining the saw being four inches in diameter. The saws were three or four inches from the burr end of the shaft.

1. By the first question of the special verdict the jury found that the plaintiff's arm was drawn into the saws in consequence of his clothing being caught by the jagged surface of the burr, and the court changed the answer. We think the

answer of the jury to this question is supported by the evidence, and the court erred in changing it. It is unnecessary to cite authority to the proposition so well settled in this court that if there be any credible evidence to support a finding of the jury it cannot be disturbed.

There is credible evidence tending to show that at the time of the injury plaintiff was in the discharge of his duty in examining the blower pipe and removing obstructions from the mouth thereof; that he got down on his knees under the lath attachment and under the burr or north end of the shaft to perform such duty, reached toward the pipe with his right arm, being on both knees and resting his left hand on the sawdust, when the machine was started by the feeder; that when the machine started it startled him and he got up out of the way, shoved back and raised up, and as he raised up his sleeve caught on the nut or burr on the north end of the shaft and was wound up so his arm went into the saw and was cut off; that as he raised up his arm came over to the end of the shaft; that he knew the nut caught him because it gave him a jerk and twist which he felt. The evidence further shows that there were leaves of metal curled up on the burr or nut, caused by the use of a cold chisel in taking off and tightening the burr. These leaves were from one eighth to one fourth of an inch in height and were sharp and jagged, and when the machine was in operation the shaft revolved with great rapidity.

It is insisted by respondent that the proof does not remove the case from the realms of conjecture, and that the evidence was not sufficient to warrant the jury in finding that the plaintiff was drawn onto the shaft in the manner found by the answer to the first question, and several cases are cited on this point. We do not think the cases cited are applicable here. There is direct and positive evidence that the plaintiff was caught upon the burr and drawn against the saw, which if believed by the jury is ample to support the finding. Nor

was this evidence inherently incredible as being physically impossible, as contended by counsel for respondent. *Nicoud v. Wagner,* 106 Wis. 67, 81 N. W. 999; *Salchert v. Reinig,* 135 Wis. 194, 115 N. W. 132.

2. Error is assigned on changing the answer of the jury to the fifth question of the special verdict. It is quite apparent from the decision of the trial judge that he changed the answer to the fifth question because of changing the answer to the first question. There being sufficient evidence to support the first finding, it is clear that the answer to the fifth question was right and should not have been disturbed.

The failure of defendant to properly guard the shaft was the cause, or at least a concurring cause, of the injury. Under the circumstances of the case the injury would not have happened but for the failure to guard the shaft, and the fact that the negligence of a fellow-servant concurred will not defeat recovery. *Sherman v. Menominee River L. Co.* 72 Wis. 122, 39 N. W. 365; *Schmolt v. H. W. Wright L. Co.* 145 Wis. 577, 130 N. W. 499; *Grant v. Keystone L. Co.* 119 Wis. 229, 96 N. W. 535; *McClure v. Sparta,* 84 Wis. 269, 54 N. W. 337; *Papworth v. Milwaukee,* 64 Wis. 389, 25 N. W. 431; *Atkinson v. Goodrich T. Co.* 60 Wis. 141, 18 N. W. 764; *Winchel v. Goodyear,* 126 Wis. 271, 105 N. W. 824; *Lower v. Whitney Bros. Co.* 147 Wis. 41, 132 N. W. 588; *Gorsegner v. Burnham,* 142 Wis. 486, 125 N. W. 914; *Sharon v. Winnebago F. M. Co.* 141 Wis. 185, 124 N. W. 299.

It follows that for the errors committed in changing the answers to the first and fifth questions of the special verdict and ordering judgment for the defendant there must be a reversal.

The record shows that the defendant, in addition to the motion that the answers to questions 1 and 5 be changed and judgment rendered on the verdict as changed, also moved for a new trial in case the motion to change the answers in the special verdict be denied, and, in the event of denial of the motion for a new trial, that the damages be reduced.

The court, having granted the defendant's motion to change the verdict, awarded the defendant judgment upon the verdict as changed. The court therefore did not pass upon the motion for a new trial nor upon the question of reduction of damages.

Since the judgment below must be reversed for the errors before mentioned, the cause should be remanded to the trial court with directions to consider and determine, in its discretion, whether there should be a new trial, and, in case a new trial be denied, determine whether the damages are excessive, and for further proceedings according to law. *Stanley S. E. L. Cong. v. La Crosse S. R. & C. Co.* 148 Wis. 261, 134 N. W. 351.

By the Court.—The judgment of the court below is reversed, and the cause remanded for further proceedings as indicated in this opinion.

A motion for a rehearing was denied, with $20 costs, on May 14, 1913.

GERTZ, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant, and others, Receivers, Respondents.

January 28—May 31, 1913.

Appeal: Successive appeals not permitted: Waiver of right: Review: Questions for jury: Costs: Street railways: Negligence: Injury to passenger in collision.

1. The supreme court has inherent authority to regulate the use of its jurisdiction so as to prevent successive appeals from a judgment and to promote, so far as practicable, a speedy and final determination of all questions involved.
2. Thus, in an action for personal injuries against two defendants, where judgment went against one and in favor of the other and plaintiff appealed from the latter part of the judgment, but the losing defendant claimed that its rights should not be deter-

mined on that appeal and that it might, later, take an appeal on its own behalf, a reasonable time is given to such losing defendant to present its objections to the judgment, taking an appeal in due form if necessary, to be considered and determined with plaintiff's appeal.

3. It is made a rule for such cases, subject to such variation as the peculiar facts of each case may require, that if any party affected by a judgment or order, who shall have had due notice of an appeal and the proceedings thereon, does not appropriately challenge such judgment or order, this court will conclusively presume that he has elected to waive the right to do so and will so dispose of the appeal as to preclude any further application to this court in respect to such judgment or order, other than the ordinary motion for a rehearing.

4. The decision of the trial judge in respect to whether evidence presented a jury question—the ruling in this case having been made both in refusing to take the question from the jury and in refusing to change the verdict—should prevail on appeal unless it appears from the whole record, having regard for his superior advantages, to be clearly wrong.

5. In an action for personal injuries received in a collision between two electric cars, it appeared that it was the custom for the cars upon the line on which plaintiff was a passenger to give cars on the crossing line the right of way at the place of the collision; that the motorman in charge of plaintiff's car stopped within fifteen feet of the crossing track and then turned on the current and attempted to cross, but was struck after going about thirty feet by a car on the other track coming down grade at a speed of thirty feet a second, both cars being lighted and it being a bright moonlight night. The motorman testified that before starting the car after the stop he looked up the other track and that it was clear for a distance of 375 feet. *Held*, that such testimony was incredible and that the motorman was guilty of actionable negligence as a matter of law.

6. Where, in an action against two defendants, judgment went against one and in favor of the other and there were separate appeals by the plaintiff and by the losing defendant, but the latter devoted its efforts on the appeal toward establishing the joint negligence of its codefendant, it is *held* that upon a reversal of the judgment as to such codefendant only costs against the latter should be awarded to plaintiff, but no costs for or against the appealing defendant, except that it should pay the clerk's fees upon its appeal.

WINSLOW, C. J., and TIMLIN, J., concur in the result.

APPEALS from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed as against one defendant; reversed as to the others.*

Action to recover for a personal injury.

Plaintiff's claim was this: While a passenger on a northbound First avenue—city of Milwaukee—car of the Chicago & Milwaukee Electric Railroad Company, operated by defendant receivers, an east-bound car of the *Milwaukee Electric Railway & Light Company* on Washington street, where the tracks of the two companies cross each other, ran into the Chicago car; causing him serious injury. Both cars were running at an unreasonable rate of speed while attempting to make the crossing,—a speed exceeding that permitted by the ordinance of the city of Milwaukee, and the motormen did not exercise such care as the law requires to avoid colliding at the crossing.

Issues were joined as to all matters covered by the verdict. The evidence proved this pretty clearly: The car on which plaintiff was injured, was, at the time thereof, passing over the intersection of the tracks before mentioned. When it had covered about half the way, the car going east struck it about fifteen feet from the front end, and forced it clear off its track. It was about 12 o'clock on a bright July night. Both cars were lighted and plainly visible from any point in either street near the crossing, while they were several hundred feet away, and all the time therefrom to the point of collision. A person on the Chicago car, as it approached the crossing, could, plainly, have seen a car approaching from the west on Washington street when several blocks distant. A motorman thereon could, likewise, readily have seen a car located as the Chicago car was when the motorman thereon started to make the crossing. As the Chicago car approached the crossing, it stopped with the front end about fifteen feet from the track on which the car was coming from the west. That was in sight from the point of view of the motorman on

the north-bound car and it was approaching at a considerable rate of speed. When it was not over 100 feet or so from the pathway of the Chicago car, the latter's motorman put on power to cross the track. About as he got well under way, he saw the danger of a collision and tried to make the crossing before the Milwaukee car reached the intersection of the tracks. He saw, or might have seen, that the motorman on the Milwaukee car was coming as if he was entitled to the right of way. His car was approaching at the rate of thirty feet or more per second. When the Chicago car had moved about its length and was going about ten feet per second, the collision occurred. The time which elapsed between the starting of the Chicago car and the accident was about two and one-half seconds,—time enough for the east-bound car to cover eighty feet or so. There was a custom, known to both motormen, that in case of a car on each track approaching the intersection at about the same time, the one on the Chicago company's line would stop and allow the Milwaukee car to pass by. The motorman on the Chicago line said that when he first saw the Milwaukee car it was 150 to 175 feet away; that he tried to go as fast as he could but had proceeded but about fifteen or eighteen feet when the accident occurred.

The jury found, specially, this: The motorman on the Chicago car did not fail to exercise the highest degree of care at the time of the collision. The motorman on the other car did not operate it with ordinary care at such time. Such want of care was the proximate cause of the accident and of the injury to plaintiff. He was damaged to the extent of $3,000.

Judgment was rendered on the verdict in favor of the receivers, but against the *Milwaukee Company*. Such proceedings were thereafter taken that the questions discussed in the opinion were duly saved for review.

Plaintiff appealed from the judgment in favor of the Chicago Company, and the *Milwaukee Company* appealed from

the judgment in plaintiff's favor. The former's appeal was duly certified to this court and, in due time, brought on for hearing. Counsel for plaintiff then insisted that, if the *Milwaukee Company* intended challenging the judgment, it should join in plaintiff's appeal or take such course as would enable the court to decide the whole matter and close the litigation, finally, by a single judgment. Counsel for the *Milwaukee Company* insisted that it was not concerned in plaintiff's appeal and could rightfully pursue an appeal in its own behalf without reference to the other. Plaintiff's appeal was submitted without such controversy being decided; but, before disposing, finally, of such appeal, such controversy was decided in the manner indicated in this opinion. The principle of the decision was applied to the particular case by ordering that the *Milwaukee Company,* within sixty days, proceed in such manner as its counsel might determine to submit for decision any objections it might have to the judgment. Pursuant to such order, the controversy as to the *Milwaukee Company* was, in due time, submitted.

For the plaintiff and appellant, *Arthur Gertz,* there was a brief by *W. B. Rubin,* and the cause was argued orally by *Max Schoetz, Jr.*

For the defendant and appellant, *Milwaukee Electric Railway & Light Company,* there were briefs by *Van Dyke, Rosecrantz, Shaw & Van Dyke.*

For the defendants and respondents, *W. Irving Osborne, D. B. Hanna,* and *George G. Moore* as receivers of the Chicago & Milwaukee Electric Railroad Company, there was a brief by *Quarles, Spence & Quarles,* attorneys, and *C. S. Thompson,* of counsel, and oral argument by *Mr. Thompson.*

The following opinion was filed March 11, 1913:

MARSHALL, J. The question of practice presented by appellant's insistence upon the objections to the judgment by either party to the action being considered and the whole mat-

ter closed by one judgment in this court, and the opposition thereto by the *Milwaukee Electric Railway & Light Company,* was a very important one. It seemed plain that the practice contended for by such company would, if approved, render possible several successive appeals to this court from one judgment and very prejudicial delay. To allow that would sanction an abuse of the jurisdiction here or confess an infirmity of judicial power to prevent it, which the founders of our system, nor the legislature in regulating it, did not contemplate. From that viewpoint, it was considered that an exigency existed warranting the court, in the exercise of its extraordinary power of superintending control, in establishing a judicial rule on a logical basis,—one sounding, reasonably, in waiver, as regards any statutory right of the party affected by the regulation, which would effectually prevent this jurisdiction from being needlessly and prejudicially used. The court dealt with the matter this way:

"To allow the practice proposed would result in an abuse of the court's jurisdiction, which cannot be tolerated. It would render possible successive appeals from a judgment, vexatiously and unnecessarily delaying the final determination of litigation. The court possesses inherent authority to regulate the use of its jurisdiction so as to prevent such hindrances. To that end it will conclusively presume, in a case of this sort, that any party affected by the judgment or order who shall have had due notice of the proceedings and does not appropriately challenge such judgment or order, has elected to waive the right to do so and will so dispose of the appeal as to preclude any further application to this court in respect to such judgment other than by the ordinary motion for a rehearing. In this particular case the matter submitted will be held to give the *Milwaukee Electric Railway & Light Company* reasonable time to enable it to properly present its objections to the judgment—taking an appeal in due form, if necessary, and having the same duly certified to this court, in which case such appeal will be placed on the calendar for hearing and disposition with the appeal al-

ready submitted. Sixty days from the entry of this order is allowed for that purpose."

That may be regarded as a rule to be observed hereafter, varied from time to time in the application of it, as the peculiar facts of each case may require,—at all times to the end that in each instance of the jurisdiction of this court being invoked in respect to any controversy, there shall be as speedy and full settlement of all interests involved as practicable, and the entire litigation closable in the action brought to a final determination. Such result with a minimum of public and private expenditure, should be the judicial policy, and there should be steady progress along that line to the highest standard attainable, leaving any infirmity which may remain to be attributable to the lawmaking power rather than to the court.

Were the servants of the receivers who were in control of the car on which plaintiff was riding when injured, guilty of actionable negligence as matter of law? Plaintiff holds the affirmative. On that his counsel faces the necessity of overcoming the judgment of the trial court twice made,—first in refusing to take the question from the jury; second in refusing to change the result so as to be in plaintiff's favor against both defendants. That difficulty, as has often been said, is great, and necessarily so. From the circuit judge's advantageous position, there is a presumption that his conclusion is right and that presumption cannot be overcome by a mere balancing of probabilities. The decision must appear not only to be wrong, but clearly so, or else prevail. What will satisfy that may vary according to circumstances. The weight of a trial judge's decision will so vary and individual conceptions as well. As said in *Meyst v. Frederickson,* 146 Wis. 85, 87, 130 N. W. 960, the rule itself is a just and very valuable one in the administration of justice and is in harmony with the spirit of the Code. But it is, necessarily, not

an arbitrary rule. In some circumstances unrecordable characteristics of a trial may be much greater than in another; in some the truth may turn wholly on the credibility of witnesses; in others, partly on that and partly on evidentiary inferences, and in others wholly on such inferences from circumstances admitted or conclusively established, matters of common knowledge and unquestionable physical elements. Again, different persons in discussing the rule and applying it, though really meaning the same, differ in words selected to express it. That cannot well be avoided. With all efforts to be impersonal, it is impossible to lay individuality entirely aside and, probably, it is best that it should be so and each, within reasonable limitations, be free to illustrate and elucidate principles in his own way using due care not to create room for supposed conflicts in the principles themselves. One way of presenting a given matter may best appeal to some minds and a different way to others. Indulgence in different ways sometimes leads to propriety of a clarifying discussion as in *Slam v. Lake Superior T. & T. R. Co.* 152 Wis. 426, 140 N. W. 30.

Probably, as there said in effect, the nearest to an impersonal rule on the subject,—the language which best, in general, meets the judicial view,—is that the trial judge's decision in respect to whether evidence presented a jury question is due to prevail on appeal, unless it appears from the whole record, having regard for his superior advantages, to be clearly wrong. To some, much clarity is added by the explanatory words "reasonable doubts being resolved in favor thereof," because the very thought of "clearly wrong" in such circumstances is pregnant with the idea that in case of fair doubt one should incline to maintain the stability of the trial decision,—that a trial judge should have that encouragement to exercise the greatest practicable care and that aid to appreciate the great responsibility resting upon him. In the judgment of the writer, the exact significance of the rule is no better illustrated than by the language of the chief justice in

Asserin v. Modern Brotherhood, 147 Wis. 520, 523, 133 N. W. 579, to the effect that an issue of fact having been solved by a jury and their decision approved by the trial judge, it should prevail "unless there is no evidence to sustain" it, "or unless the great weight of the evidence is against" it, "and that weight of evidence is so reinforced by all reasonable probabilities and inferences that it becomes overwhelming." From my viewpoint, in this case, it is appropriate to again refer to the dignity to be accorded to a trial judge's decision to the end that it may not be thought that there is any disposition not to give due heed to it in the particular instance.

Here, it is significant that there is no material question about the evidentiary facts. True, there is some conflict in the statements of witnesses, but the real truth at the points of conflict appears by indisputable or conceded physical facts. In that situation a trial judge's superiority of opportunity for determining the ultimate element, is at the minimum.

These facts stand out like the noon-day sun in a cloudless sky: It was customary for a car on the Washington street line to be accorded the right of way, when it approached the First avenue line so near the time of approach thereto of a car on the latter that one would reasonably be required to slow up, or stop if need be, to afford opportunity for the other to pass by. The car on the Avenue line was drawing a trailer and the two had passengers aboard making quite a heavy train; requiring considerable time, comparatively, to make the crossing ahead of the single car on the Washington street line. The Avenue train came to a stop on a level track with the front end about fifteen feet from the Washington street track. The motorman could not resume motion and clear the crossing without delaying a car coming down the grade on the Washington street line, unless it was quite a distance away. His car could not move but a few feet without entering the zone of danger. At the instant he applied the power, the oncoming car was in plain sight, moving at considerable speed on a well known down grade, and was but a

few car lengths from the point of intersection. There can be no fair doubt about that, since the Avenue train, though speeded up to seven miles per hour, for the purpose of clearing the crossing ahead of the other car, moved but about a car length before the mischief was done. Not over about two and one-half seconds elapsed between the application of the power and the collision.

True, as counsel for the receivers contend, the motorman on the Avenue train testified to looking west on the Washington street line the instant before he applied the power and seeing a clear track for at least a block, or some 375 feet. But is that credible? It was a bright July night. One could see west on the Washington street track for several blocks. Could the car on that line have been coming at a speed of some twelve times that of the Avenue car an instant after the power was applied and yet the former not strike the latter hard enough to badly wreck both? The motorman saw the coming car, as he said, about as he entered upon its track when it was 150 to 175 feet away, and, yet, his car moved but about fifteen feet more before the collision, notwithstanding the vigorous efforts of the motorman on the coming car to check his speed. Is that possible, especially, in view of the result of the blow? Giving the motorman on the Avenue car the benefit of every reasonable inference, considering the distance covered from the time he applied the power until the collision, the Washington street car could not have been more than 100 feet or so from the point of intersection when the start was made, and in plain sight, coming down the grade with the evident purpose of making the crossing without stopping, and at the instant he said he saw it, 150 or 175 feet away, it was, in fact, but two or three car lengths and the collision inevitable.

There can be but one of two conclusions to be reasonably drawn from what has been said: either the motorman did not look west on the Washington street track before he applied the power, or did so and saw the coming car in dangerous

proximity and thought to speed up and take the chances of clearing the crossing in time to avoid a collision. We have his admission that his car moved but about fifteen feet after he saw the other car before the blow was struck. It seems too clear for any fair doubt that when he saw the latter, as he said, 150 or 175 feet off, it was not half that far and that it was in plain sight, coming down grade and so near as to suggest danger in attempting to cross in front of it, when he applied the power.

In view of that and the admitted custom to afford a car on the Milwaukee line the preference in making a crossing, in case of reasonable necessity for one to wait for the other, how can it be said that the man in charge of the Chicago car did not, as matter of law, fail to exercise the highest degree of care for the safety of passengers? It seems rather that he failed to exercise even ordinary care—that it is putting the matter as mildly as the evidence will warrant, when it is said that his conduct may be regarded as within the field of inadvertence.

It follows that the trial court should have held, at the first opportunity, that there was no question for the jury as to actionable negligence of those in charge of the Chicago & Milwaukee Electric Railroad Company car, and that, failing in that, it should have corrected the verdict and given judgment to such effect, in accordance with the motion therefor.

The argument for the *Milwaukee Electric Railway & Light Company* is devoted wholly to the subject of negligence of its codefendant, and with that we fully agree. That gives rise to a question as to costs.

The error in not holding the Chicago Company liable with the *Milwaukee Company* was remediable on plaintiff's appeal. The latter company could have united with the plaintiff on that question without the proceedings which led to its doing so. We do not understand that it really raises any other. No other is argued in the brief in its behalf. In any event, it seems the case, without error as to its negligent participa-

tion in the accident, was submitted to the jury and closed by the verdict. Had the court instructed the jury as requested, and that been followed by a finding against the Chicago Company, possibly, the *Milwaukee Company* might have been acquitted; but, in view of the circumstances which characterized the approach by the latter company's car to the vicinity of the crossing, it is most likely that the jury would have found such company culpably contributed with the Chicago Company to produce the accident.

As we understand the presentation made by counsel for the *Milwaukee Company,* no serious contention is made in its behalf, if any at all, contrary to the view above expressed; but, if it be otherwise, the further contention must be regarded as without efficient merit. It looks here as if the *Milwaukee Company,* in practical effect, joins with the plaintiff against the Chicago Company, though the former's appeal is, in form, adverse to the plaintiff.

Under the cost statute, sec. 2949, Stats., costs in this court go to the prevailing party, not, necessarily, to the prevailing person. Such party, within the meaning of the statute, has reference to prevailing interest. Those wholly united in interest in challenging a judgment, though by several appeals, constitute one party, and in case of success are entitled, ordinarily, to a single bill of costs. *Harrigan v. Gilchrist,* 121 Wis. 127, 449, 99 N. W. 909. In the outcome here, plaintiff will obtain all the relief it seeks and the *Milwaukee Company* will be likewise successful. Why then should plaintiff have judgment for costs against the one which supports it in securing the relief it seeks against the Chicago Company? If that be answered in favor of the *Milwaukee Company,* should it have judgment against the party adverse to it, that is, the Chicago Company, against which it did not, in form, take any appeal? On the whole, it seems that the result as to the *Milwaukee Company,* may logically be treated as a part

affirmance and part reversal, within the broad spirit, if not the letter, of the statute. The judgment must be affirmed as to that part which it, in form, challenges, but reversed on its real ground of complaint. That leaves the matter of costs wholly to the discretion of the court. It is considered best to exercise such discretion by not granting costs either for or against the *Milwaukee Company,* and requiring it to pay the clerk's fees in this court on its appeal.

By the Court.—The judgment in favor of the receivers is reversed, with costs against them in favor of plaintiff. The judgment against the *Milwaukee Electric Railway & Light Company* is affirmed without costs for or against it, except it will pay the fees of the clerk of this court on its appeal. The cause is ordered remanded with directions to grant a motion, when made by the plaintiff or the *Milwaukee Company,* for a re-entry of the judgment so as to be against the receivers as well as against such company.

The following opinion was filed March 20, 1913:

WINSLOW, C. J. (*concurring*). I concur in the result reached in this case. I add this note simply to say that in my judgment the rule quoted from the *Asserin Case* has no bearing on the question of the weight to be given to the decision of the trial judge on a motion for nonsuit or directed verdict. That question was not under consideration in the *Asserin Case,* but simply the question of the effect of the verdict of the jury. The familiar rule was laid down that the verdict will not be set aside unless there is no evidence in its support, or unless the great weight of evidence is against it, and that weight is so reinforced by all reasonable probabilities and inferences that it becomes overwhelming.

This rule has no bearing on the initial question, namely, the question whether *there is any evidence* to go to the jury.

That question must be decided by itself. It gets no help from the verdict, because the verdict cannot make evidence where there was none before.

TIMLIN, J. I concur in the result only.

A motion for a rehearing was denied, with $25 costs, on May 31, 1913.

STATE EX REL. MARVIN, Respondent, vs. LARSON, Appellant.

February 22—May 31, 1913.

Intoxicating liquors: Licenses: Statute construed.

Sec. 1565*d*, Stats. (Laws of 1907, ch. 434), does not give to the owner of premises which were under license for saloon uses on June 30, 1907, the power, by refusing to lease such premises to any aspirant for a license, to make that aspirant eligible to receive a license although he has never occupied the premises for saloon purposes and the ratio limit fixed by the section has already been exceeded. The proviso in said section means that, notwithstanding the ratio limit, the owner of property under license for saloon purposes on June 30, 1907, may by himself or his tenant continue its use for such purposes (if properly licensed) thereafter, and any person in possession of such premises as lessee on said date, if thereafter deprived of opportunity to continue their use by refusal of the owner to lease for such purposes, by destruction of the building by fire or the elements, or by the operation of other provisions of the law (*e. g.* the establishment of a no-license area), may, if properly licensed, continue the business at some other location.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *W. F. & A. C. Wolfe,* and oral argument by *W. F. Wolfe.*

For the respondent there was a brief by *Bunge & Bosshard,* and oral argument by *Otto Bosshard.*

The following opinion was filed March 11, 1913:

WINSLOW, C. J. This is an action in the name of the state, brought in the circuit court for La Crosse county and on leave of court, to enjoin the defendant from maintaining a saloon in the city of La Crosse. The plaintiff's claim is that the defendant's saloon license, though granted by the common council of the city, was void because issued contrary to the provisions of sec. 1565*d*, Stats. (Laws of 1907, ch. 484), hence that the saloon was a public nuisance under sec. 1563, Stats., and subject to abatement in this equitable action under sec. 3180*a*, Stats.

The concrete question presented by the case is simply as to the proper construction of sec. 1565*d*, *supra*. That section reads as follows:

"On and after the first Tuesday in July, 1907, the number of persons and places which may be licensed to sell, deal and traffic in malt, ardent, spirituous or intoxicating liquors in the various towns, villages and cities in this state, shall be and hereby are limited as follows:

"One such license may be granted to and issued for each two hundred and fifty inhabitants or fraction thereof in any town, village or city in this state, such population to be determined by the last preceding state or national census, provided, however, that in all such cities, villages and towns where a greater number of licenses may have been granted or issued and in force on or prior to the thirtieth day of June, 1907, than would be permissible under the foregoing limitation, it shall be lawful and the local authorities are hereby authorized in their discretion to grant and issue licenses equal in number to those granted or issued and in force on or prior to said last-mentioned day; but no additional licenses in number shall be granted or issued in any such city, village or town until the increase in population thereof brings the same within the foregoing limitation, and provided further that licenses be granted or issued to persons for those places or locations for which licenses were issued or granted on or prior to the thirtieth day of June, 1907, unless by reason of a re-

fusal of the owner to lease the same for such purposes, their destruction by fire or the elements or the same be refused by operation of law or under the provisions of this act, then and in either of such cases such license may be issued or granted to some other location."

The facts are that on June 25, 1912, when the council granted a license to the defendant, it had already granted 148 saloon licenses for the year beginning July 1, 1912. This was considerably more than one license for each 250 inhabitants of the city, hence the council had no power to grant a license to the defendant, unless he came within the exceptions in the proviso. He claims to be within those exceptions, because, prior to the granting of his license, he had obtained from one Peterson, the owner of certain premises in the city which were used for saloon premises on June 30, 1907 (but not since that date), a written refusal to lease said premises to him for saloon purposes for the ensuing year. The defendant had never been a tenant of the Peterson premises, and had not been in the saloon business anywhere for several months prior to June 30th, but commenced the saloon business in other premises July 1, 1912, under his supposed license. The argument is that under the proviso of the law any one who owns premises which were under license for saloon uses June 30, 1907, can, by refusing to lease the same to any aspirant for a license, make that aspirant eligible to receive a license, although he has never occupied the premises for saloon purposes and the ratio limit fixed by the law has been already exceeded.

We are very certain that such is not the true construction of the law. To our minds the purpose is plain and the expression of that purpose fairly clear. The main thought of the section was doubtless to set a limit, which should adjust itself as the population increased or diminished, beyond which the number of saloons should not go. While this was the dominant idea, it was also realized that in some places this limit had been passed, and it was thought that, where prem-

ises were already in use for saloon purposes, as well as where a tenant was obliged to remove his business by circumstances over which he had no control, exception might be made in favor of such premises or such tenant. The theory evidently was that the law might operate too harshly and summarily if provision were not made to protect, in some degree at least, investments already lawfully made.

It seems to us absurd to suppose that the intention of the law was to give to any man the power, year after year, to confer upon any third person he might choose eligibility to receive a saloon license in disregard of the ratio limit, simply because of the ownership of real estate which was under license June 30, 1907. This would establish a new kind of privilege or easement running with the real estate, which would enable the owner at each recurring license period to exercise a controlling influence in determining the number of saloons to be licensed above the ratio limit, and at the same time to make money out of that control.

Perhaps the real intent of the proviso is not expressed as clearly as might be desired, but we find no difficulty in construing it as follows: Notwithstanding the ratio limit, the owner of property under license for saloon purposes June 30, 1907, may by himself or his tenant continue its use for such purposes (if properly licensed) thereafter, and any person in possession of such premises as lessee June 30, 1907, if thereafter deprived of opportunity to continue their use by refusal of the owner to lease the same for such purposes, destruction of the building by fire or the elements, or the operation of other provisions of the law (*e. g.* the establishment of a no-license area), may, if properly licensed, continue the business at some other location.

The defendant here does not belong to either class, hence the judgment is right.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied, without costs, on May 31, 1913.

MILWAUKEE BOSTON STORE, Appellant, vs. KATZ and another, Respondents.
SAME, Respondent, vs. SAME, Appellants.

March 14—May 31, 1913.

Contracts: "Lease" of space in department store: Quasi-partnership: Violation: Equitable action for cancellation, accounting, etc.: Remedy at law inadequate: Unlawful detainer: Construction of contract: Commissions on "gross sales:" Forfeiture for breach: Waiver: Application of payments: Relief in equity against forfeiture: Inequitable conduct of other party: Accounting: Advertising.

1. A contract by which plaintiff, the proprietor of a large department store, "leased" to defendants certain space for the maintenance of a department in such store, and which contained among other features provisions for the carrying on of a joint business and a division of the proceeds between the parties, for joint possession of certain aisles and approaches in the store and of certain portions of space leased, and for retention by plaintiff of the key to the store, was more than a lease and might more properly be denominated a partnership or *quasi*-partnership agreement.
2. An action based on a wilful violation of such contract by said defendants and an election by plaintiff to terminate the contract in accordance with its terms for that reason, wherein plaintiff asked that the lease be declared canceled and defendants be ordered and adjudged to quit and surrender the premises to the plaintiff and be enjoined from interfering with plaintiff's possession thereof, and also asked the appointment of a receiver and for an accounting which would involve complicated business relations covering a number of years, is *held* properly maintainable in equity, being in the nature of a suit for dissolution of a partnership and for an accounting, and the remedy at law by an action of unlawful detainer being inadequate.
3. Said contract provided that defendants should pay to the plaintiff "ten per centum on the gross sales of said department" and that "all merchandise sold in said department and money received from sales shall be immediately delivered to and handled by" the plaintiff. *Held*, that the terms "gross sales" and "all merchandise sold" included so-called cost sales to employees of the defendants, and that plaintiff was entitled to the stipu-

lated commission upon such sales, irrespective of whether or not the defendants made a profit upon them.

4. Evidence showing, among other things, that defendants—knowing that the agreement entitled plaintiff to ten per cent. commission on all sales, that all sales were required to be reported to plaintiff and go through the regular channels of its business, and that it had no means of knowing what the sales were or of collecting commissions thereon unless they were reported—actually concealed from plaintiff the cost sales to employees and others, both by the manner in which the bundling and delivery was done and by the manner in which the books were kept, is *held* to sustain a finding that defendants intentionally violated the contract.

5. Plaintiff, after learning on September 15th that such unreported cost sales had been made in violation of the contract, promptly demanded a full statement thereof. Such a statement was made to it on September 29th, and it then first learned the extent of such sales. On October 2d it notified defendants of its election to cancel the contract and lease as therein provided because of such breach. *Held*, that plaintiff had not, by continuing to do business under the contract and receiving the benefits thereof up to the time of such notice, waived the forfeiture.

6. A waiver must be predicated upon the intentional relinquishment of a known right; and in order to constitute a known right the substantial facts and circumstances out of which the right springs must be known.

7. At the time of giving notice of cancellation of the agreement, plaintiff offered to continue to transact the business of the department in the manner in which it had theretofore been transacted, without prejudice to the right to insist upon a forfeiture, until a surrender of the premises by defendants. Defendants refused to surrender possession, notified plaintiff that they should continue to hold under their lease, and demanded that plaintiff continue to perform its duties thereunder. Plaintiff then gave notice that pending the determination of an action to enforce its rights the business of the department would be conducted on its part substantially as theretofore, except that it would apply for an order authorizing the deposit of the proceeds of sales or so much thereof as might be sufficient to indemnify it against loss or damage by reason of defendants' unlawful withholding of the premises; and stated that until such order should be made the percentage of the proceeds of sales which it should retain as theretofore would be applied on account of such loss and damage. Plaintiff never applied for

such order, and the business was thereafter conducted precisely as it had been before, plaintiff retaining the stipulated percentage. *Held*, that by so continuing the business plaintiff waived its right to insist upon the forfeiture.

8. Under the circumstances stated, plaintiff must be held to have retained the stipulated percentage as the compensation provided in the agreement. If defendants owed plaintiff damages for withholding possession, they also owed it said percentage on sales made. Hence they as debtors, and not the plaintiff as creditor, had the right to say upon what debt the moneys which they turned over to plaintiff should be applied; and their unequivocal notice to plaintiff that they should continue to hold and do business under the contract was equivalent to a direction that the ten per cent. to be retained by plaintiff should be applied as theretofore.

9. The fact that great loss would accrue to plaintiff from a sudden termination of the business relations between the parties did not give it the right to continue such relations even temporarily for its own advantage, and to reap the benefits thereof, without waiving the forfeiture.

10. When, as in the case stated with respect to such forfeiture and the waiver thereof, declarations and conduct are at variance, the conduct and acts of a party must be held to outweigh declarations and be controlling.

11. The condition of the contract which defendants violated, requiring them to report all sales and at once turn over to plaintiff the proceeds thereof, was one intended as security for the payment of the ten per cent. commission to which plaintiff was entitled, and full compensation for such breach can be made by a money payment; hence, even in the absence of any waiver, equity may relieve against the forfeiture resulting from such breach.

12. It appearing that a large business had been built up in defendants' department, the good will of which was of great value; that plaintiff would have almost the whole benefit thereof if defendants were required to vacate the premises; that plaintiff's conduct had been inequitable, in that it had withheld from defendants the fact that it had secured rebates on advertising contracts, a portion of which belonged to defendants, and had wrongfully kept back and retained other considerable sums to which defendants were entitled, it is *held* that, even if there had been no waiver of the forfeiture, equity would relieve against it.

13. Under the terms of the contract between the parties with reference to advertising, and the practical construction which they

gave it from the beginning, plaintiff was not entitled to reimbursement from defendants for moneys paid for newspaper space occupied by head-plates containing the name of the store and by editorial matter relating generally to the store and not to any specific department; nor could the cost of trading stamps properly be charged to this class of general advertising.

APPEALS from a judgment of the circuit court for Milwaukee county: JAMES WICKHAM, Judge. *Affirmed.*

Suit in equity for an accounting and to quiet plaintiff's title to certain space in its store, known as the *Milwaukee Boston Store,* hereinafter referred to as the *Boston Store.* On the 7th day of September, 1906, the plaintiff, the party of the first part, and the defendant *Herman Katz,* the party of the second part, entered into an agreement, of which the following, so far as this case is concerned, are the material parts:

"Said party of the first part, in consideration of the covenants and promises hereinafter made by the party of the second part, does hereby lease and demise to said party of the second part for the term beginning the first day of May, 1907, and ending the thirtieth day of April, 1922, that part of the second floor of the building known as the *Boston Store,* or Plankinton Block, at the southeast corner of Grand avenue and Fourth street in the city of Milwaukee, as follows: That certain space indicated by diagram thereof attached hereto and made a part of this contract having approximately nineteen thousand two hundred and thirty square feet in area; it being agreed, however, that the space of three feet immediately east of the demised premises to be maintained and kept open as an aisle for the general use of said store; it being also agreed that possession of the westerly portion of the second floor of the so-called Yewdale Building is not to be given to second party until May 1, 1908; said space to be used by said party of the second part for the sole purpose of selling at retail on said premises the following described merchandise, to wit: women's and misses' furs and ready-to-wear outer garments, except wrappers, kimonas and lounging gowns; also children's furs and ready-to-wear outer garments in sizes from four years up, but not including infants' sizes from one to five years; also ladies', misses' and children's ready-to-wear

millinery, head wear and trimmings thereof, except for infants from one to five years of age; it is understood that the said party of the second part at all times during the term of this lease and the extension thereof is to have the exclusive right to sell in said *Boston Store,* or Plankinton Block, the merchandise above described and none other, and that during such period the said first party will not license the sale of any such merchandise by any person other than the party of the second part; it being agreed, however, that said party of the first part shall be at liberty to make such alterations in the front or interior of said building as it shall from time to time deem to be to the advantage of the business of the *Boston Store,* but not so as to unfavorably affect the business of party of the second part.

"Open passageways shall be kept at all times to, through and from said department to elevators, stairways, aisles and the other departments of said *Boston Store* without obstruction of any kind, and second party agrees to devote sufficient open space for bundlers' and cashiers' desks to accommodate said department at such places therein as said party of the first part shall from time to time direct."

"Said party of the second part agrees to furnish suitable store furniture and fixtures for the space occupied by him at his own expense, which fixtures, except those which shall be permanently fixed, may be removed by him at will from said premises upon the termination of this lease either by lapse of time or for any of the reasons hereinafter set forth; and said party of the second part promises and agrees that in the use of said fixtures and in the display and arrangement of the merchandise of said party of the second part, said party of the second part will at all times submit to the reasonable direction and dictation of said party of the first part."

"Access to said building shall be allowed to party of the second part at all reasonable times, but the keys of said building are to be retained by the party of the first part or its agent.

"And the party of the second part further covenants, promises and agrees that he and his employees and agents will at all times conform to all requirements of law and to such reasonable rules and regulations as the party of the first part may from time to time establish with respect to the conduct

of business of the *Boston Store,* notice of which rules and regulations shall have been given to said party of the second part; and does further covenant, promise and agree that said party of the second part will not employ any person or persons in or about the business of said department, except the head of the cloak and the head of the millinery departments who shall be objectionable to the party of the first part, and if such persons shall be employed by him he, she or they shall be removed upon request of said party of the first part and refused admittance to said store.

"And said party of the second part does expressly covenant that this contract and lease shall become void and all rights of said second party thereunder immediately cease if at any time during said term said party of the second part shall, after notification, wilfully sell or allow to be sold in said department any other wares or merchandise than that hereinbefore specified; or shall assign this lease or sublet the whole or any part of said premises except to a corporation to be formed by him, his liability to first party, however, remaining the same as before such assignment; or shall for the period of two days, without reasonable cause, fail to carry on the business of said department; or shall at any time wilfully and intentionally fail to comply in all respects with the reasonable rules of said party of the first part respecting the management of said *Boston Store;* or shall wilfully and intentionally so conduct the business of his department as to detract from the good reputation of the *Boston Store;* or shall wilfully and intentionally violate any of the other covenants, promises or agreements herein contained; and said party of the second part further covenants, promises and agrees that in case said party of the second part shall during said term become insolvent or be adjudged a bankrupt, or a petition in bankruptcy be filed by him, or if such corporation be adjudged bankrupt, or if a mortgage or a bill of sale be executed of the merchandise in said department, said party of the second part will, in either case, on demand of said party of the first part surrender said demised premises and cancel this contract and thereby make the same null and void, and does hereby grant unto said party of the first part the right, privilege and option, upon the happening of either of said events, to take immediate possession of said premises and to

purchase and acquire from said party of the second part, or his assigns, all and singular the merchandise, furniture, property and effects then on hand, or any part thereof, belonging to said department at a valuation to be agreed upon by said parties at that time, or in case of disagreement, at a price to be ascertained by the award of two arbitrators, one of whom shall be chosen by said party of the first part, and one of whom shall be chosen by said party of the second part, and a third if necessary to be chosen by said two arbitrators in case of their disagreement, the award or ascertainment by any two of said arbitrators to be binding; it being understood that said party of the first part may elect to purchase said described merchandise upon said ascertained valuation if said party of the first part shall see fit to, but said party of the first part shall have the right to decline to make such purchase and may remove the property of the party of the second part from said leased premises or from the *Boston Store* forthwith at the cost and expense of the said party of the second part, and may store the same at the cost and risk of said party of the second part in any storage warehouse in the city of Milwaukee.

"Said party of the second part promises and agrees to advertise continuously (but not necessarily each day) his merchandise and department in conjunction with the party of the first part to the extent hereinafter mentioned in all mediums selected by the party of the first part, and agrees to advertise his merchandise and department in no other manner without the consent of party of the first part; and further promises and agrees to expend during each year no less than three per cent. of the gross sales of the business of said department for such advertising, both general and special, including trading stamps, the cost of which stamps is not to exceed one half of said three per cent.; and to allow said party of the first part to manage and control said advertising in all respects; it being understood that said party of the second part shall have advertising space and location commensurate with the relative importance of his department; and does also agree to contribute towards the expense and loss of what is known as 'Charge Account' a *pro rata* percentage not exceeding five per centum upon all charge sales of said *Boston Store* made by said party of the second part, it being understood that said party of the

second part is fully informed and recognizes the so-called 'Credit System' in force at the *Boston Store,* and will make no credit sales except through said 'Charge Account,' the books of which shall, during reasonable hours, be open to inspection by said party of the second part.

"And said party of the second part, in consideration of the premises, does hereby promise, covenant and agree to and with said party of the first part, that during the continuance of said lease said party of the second part will pay to said party of the first part a commission on the gross sales made by the party of the second part through said department, as follows: Ten per centum on the gross sales of said department. . . .

"And it is agreed by said parties that all payments by said party of the first part to party of the second part shall be made in cash in weekly instalments each week during the term of this lease, seventy-five per centum thereof on Mondays, and the remainder of said week's instalment after deducting the amount of commissions and rental belonging to party of the first part and all other indebtedness owing by second party; and said party of the second part agrees that all merchandise sold in said department and money received from sales shall be immediately delivered to and handled by the cashier of the party of the first part to be held as trust funds only for said party of the second part, except such sums as shall be deducted therefrom for the commission or other expense or indebtedness belonging to said party of the first part; the balance of the moneys, after such deductions are made, shall be paid by the party of the first part in cash to said party of the second part, during week following such sales, during the term of this lease.

"The party of the first part agrees to furnish said party of the second part with cashier, cash service, bundlers, window trimmer and janitor service, and further agrees to deliver all goods sold by the party of the second part through the regular and customary delivery system in use in said *Boston Store,* and does further agree to furnish heat, light and elevator service and power for alterations pertaining to said department, without cost or charge to said party of the second part.

"It is further understood and agreed that all business of

said department transacted by said party of the second part shall be done upon the above described leased premises and all deliveries made therefrom, and shall be exclusively done in the name of the *Boston Store,* and that all wrapping paper, boxes and other wrappings deemed necessary for merchandise sold or delivered out of this department shall have the name of the *Boston Store* printed thereon and no other name than that of the party of the first part, the party of the first part to furnish all necessary wrapping paper and twine, but party of the second part is to furnish all necessary boxes, and other wrappings deemed necessary by him, and that all printing done by party of the second part shall be done in the general style adopted by the party of the first part."

"And said parties of the first and second part have also expressly agreed that notwithstanding the covenants herein contained said party of the first part reserves the privilege and shall be at liberty at all times to open and conduct at such place in the *Boston Store* as it shall desire what is known as 'Bargain Sales Room' at which competing lines of merchandise may be carried and sold for the purpose of said 'Bargain Sales Room,' it being understood and agreed that party of the second part shall have the right to join in the purchase and sale of all merchandise pertaining to his department in said 'Bargain Sales Room,' also to make sales of merchandise therein from his own department, it being also understood that in all cases where second party declines to join in purchases therefor, said party of the first part may nevertheless make the same.

"It is further agreed that the party of the second part shall have the right to use the two windows east of the main entrance, as now existing in the *Boston Store,* for display purposes at all times, except that during the period between the tenth and twenty-fifth days of December in each year the party of the second part may use one half of said space, the displays in said show windows to be arranged by the window trimmer to be furnished by said party of the first part, he to regard the reasonable wishes of second party in that behalf."

"And said party of the second part further promises, covenants and agrees that at the termination of said lease by lapse of time, or otherwise, said party of the second part will promptly and peaceably remove his merchandise and effects

from said department and from said *Boston Store,* if said party of the first part shall so direct, and expressly waives and relinquishes all rights of a tenant holding over under the statute, and does further promise and agree that he will not hereafter hold out or advertise his merchandise as having at any time been in a department of the *Boston Store,* or that said merchandise, or said party of the second part, has ever theretofore been connected with the *Boston Store.*

"It has been also agreed that if said first party shall have its present lease of the *Boston Store* extended beyond the year 1922, said second party shall have the right to a like extension of this lease so as to cause the same to be in force and effect during said extended term as though the term originally created hereby were identical therewith.

"All of the provisions and premises herein contained shall inure to the benefit of and be binding upon said first and second parties and their respective successors or legal representatives and the corporation to be formed by party of the second part as above provided."

The grounds of the action alleged in the complaint, as summarized by plaintiff's counsel in their brief, were that the defendants had wilfully and intentionally violated the contract, in that they had wilfully and intentionally failed to comply with the reasonable rules and regulations established by the plaintiff for the handling and delivery of merchandise sold through said department and the handling of the proceeds of sales to insure the proper accounting and the transaction of the business through the proper channels; and in that all of the business of the department had not been done exclusively in the name of the plaintiff in the manner required by the terms of the agreement and the reasonable rules and regulations established by the plaintiff and known to the defendant, but that, in wilful and intentional violation of the terms of the contract, they had made numerous sales through the department, aggregating large sums of money, which they intentionally and fraudulently suppressed and concealed from the knowledge and information of the plaintiff, and the proceeds of which they wilfully and fraudulently

omitted to turn over or deliver to the plaintiff or its cashier to be held in trust and accounted for as provided by the contract, but which they fraudulently converted and appropriated to their own use without accounting to the plaintiff for the commissions which, under the terms of the contract, were the property of the plaintiff.

That by reason of such wilful and intentional violations the plaintiff, prior to the commencement of the action, had duly elected to terminate the contract and that the same had been duly terminated in accordance with the terms thereof. That the plaintiff had an interest in the business of all the departments of the store, all of which was required to be conducted exclusively in its trade name, and that as the proprietor of said store it had, through such departments, including the department conducted by the defendants, built up a large and valuable patronage in the city of Milwaukee and elsewhere throughout the state, the good will of which was the property of the plaintiff and of great value; that to avoid the sacrifice of such good will and irreparable loss to the plaintiff it was necessary that the business of such departments, including that which had been conducted by the defendants, should be continued without substantial interruption, and to that end it was necessary that the provision of the contract authorizing the plaintiff to purchase the stock and fixtures on hand should be specifically enforced. That notwithstanding the premises and the termination of the contract the defendants had refused to vacate the department, but had persisted in the occupation thereof with their furniture, fixtures, and stock of merchandise, but that such occupation by them since the termination of the contract had been and was without the consent of the plaintiff and wrongful, and that because of such wrongful refusal to surrender to the plaintiff the use and occupation of said department it was compelled under protest to continue to transact the business thereof through the defendants until its rights in the premises could be enforced by

the court. That the defendants had not kept or preserved any proper or accurate account of the sales made through said department and not reported or accounted for to the plaintiff, and had destroyed many of their books of account and other records in which, as claimed by them, the transactions had been recorded, by reason of which and the falsification of such books and accounts in relation to said transactions as had been preserved, and because the facts and details in relation to the transactions were wholly within the knowledge of the defendants, the plaintiff was unable to state the amount thereof, and that an intricate and difficult accounting would be required.

The prayer for relief was that a receiver be appointed to take charge of the department pending the determination of the action to conserve the business and good will thereof for the benefit of the plaintiff under such directions of the court as regards the conservation and distribution of the proceeds of sales as should be deemed just and equitable; that the provision of the contract giving the plaintiff the right to purchase the stock and fixtures in the contingency which had happened be specifically enforced, and that the defendants be enjoined from interfering with the business or with the possession of said department by the plaintiff, subject to such rights as might be conferred on the receiver; that an accounting be had, to determine the amount of the sales upon which no commissions were received by the plaintiff, and that the defendants be ordered and adjudged to pay the amount with interest found to be due on such accounting; that the cancellation and termination of said agreement and lease made by the notice as alleged in the complaint be confirmed and said agreement and lease declared to have been terminated and canceled; that it be adjudged and decreed, in view of the cancellation of the contract, that the plaintiff is entitled, as against the defendants or either of them, their agents, servants, or employees, to the possession of the premises, and that

they be ordered and adjudged to quit and surrender the same to the plaintiff and be permanently and forever enjoined from interfering with the possession thereof by the plaintiff, and that the plaintiff have and recover from the defendants the damages to which it is legally and equitably entitled by reason of the wrongful withholding of the possession of said premises by the defendants since the termination of the contract, and for general relief.

That part of plaintiff's prayer for relief seeking a decree for specific performance in relation to the purchase of the stock was withdrawn upon the trial and is not insisted upon on this appeal.

The defendants' answer denied, generally, the legal effect of the steps taken by the plaintiff to terminate the contract; denied that the sales not reported or accounted for were sales within the terms of the lease, or, if they were within its terms, denied that the violation of the contract in respect thereof was wilful and intentional, and alleged that the plaintiff had waived the grounds of the forfeiture relied on in the complaint by continuing the business after notice of the violation of the contract. It further alleged that plaintiff had fraudulently overcharged them on certain accounts under the contract, by reason whereof it did not come into a court of equity with clean hands and was not entitled to the relief prayed for in the complaint.

The cause of action asserted in the first counterclaim was, in substance, that the plaintiff had received various rebates from newspapers on account of advertising which should have been distributed among the departments, but which it had fraudulently retained; that it had fraudulently retained a large sum on the trading-stamp account in excess of the cost of the stamps which it was entitled to retain, and as a result of the payment of five per cent. on all charge sales by the various departments a large surplus was accumulated which should

have been distributed, but which the plaintiff had fraudulently appropriated to its own use.

Plaintiff's notice, dated September 30, 1911, served October 2, 1911, was as follows:

"You will take notice that you have wilfully and intentionally violated the covenants, promises and agreements on your part contained in the contract and lease under which you hold and occupy the cloak, suit, millinery and waist department of the *Milwaukee Boston Store* in that you have persistently failed to report to the *Milwaukee Boston Store* sales made by you in said department or to account to the *Milwaukee Boston Store* for commissions to which it was entitled on such sales.

"You are further notified that the *Milwaukee Boston Store* elects to terminate and cancel said contract and lease which was entered into between *Milwaukee Boston Store* and said *Herman Katz* and bears date the 7th day of September, 1906, and hereby demands that you forthwith quit and surrender up the same to the *Milwaukee Boston Store,* and the said *Milwaukee Boston Store* hereby offers to purchase and acquire all the merchandise, furniture, property and effects belonging to you and on hand in said department at a valuation to be agreed upon by the parties or at a price to be ascertained by arbitration in the manner provided for in said contract and lease.

"You are further notified that in the event of your failure to so vacate and surrender possession of said premises on or before the 7th day of October, 1911, the *Milwaukee Boston Store* will proceed to enforce its rights to the possession of said premises and its right to acquire said merchandise, furniture, property and effects in accordance with the provisions of said contract and to an accounting for the commissions to which it is entitled from all sales heretofore made by you and not reported or upon which the commissions provided for in said contract have not been paid.

"Until your vacation and surrender of the premises as herein required, to avoid irreparable loss to either party, we will at your option or until further notice from us continue to transact the business of the department in the manner in

which it has heretofore been transacted by us, without prejudice, however, to our right to insist upon the forfeiture of your rights under said contract and lease."

The defendants' answer thereto, dated October 2, 1911, read:

"In answer to your demand and notice to quit, we have to say that we have referred the same to our attorneys, Mr. Hoyt and Mr. Glicksman, submitting the whole matter to them. We are advised by them that your claimed right to terminate our lease is wholly without foundation. We therefore refuse to comply with your demand and hereby notify you that we shall continue to occupy the premises covered by our lease, and we demand that you continue to perform the duties imposed upon you thereunder."

The final notice served by plaintiff on defendants, dated October 4, 1911, was as follows:

"In view of your positive refusal to comply with the notice and demand heretofore served upon you to vacate and surrender the possession of the department of the *Milwaukee Boston Store* heretofore held and occupied by you, confirming said notice heretofore served upon you, you are further notified that pending the determination of the action which has been begun to enforce the rights of the *Milwaukee Boston Store* in the premises all goods sold by you from said department and delivered to us will be accounted for and handled by us and the business of said department, regardless of the contract which has been terminated, will be conducted on our part substantially as heretofore, except that we shall apply to the court as soon as practicable for an order authorizing the deposit, until the surrender by you of said department, of the proceeds of such sales or so much thereof as may be sufficient to indemnify us against loss or damage sustained by us and which may hereafter be sustained by reason of your unlawful withholding from us of the possession of said department to which we are now entitled. And in the meantime and until such order shall be made the percentages of the proceeds of sales which we shall retain as heretofore will be applied on account of such loss and damage."

The court found as facts:

"1. That the defendant *Herman Katz* from May 1, 1907, to May 17, 1907, and thereafter the defendant *Milwaukee Apparel Company,* a corporation, of which the said *Katz* was president and principal manager, from May 17, 1907, to October 2, 1911, operated certain departments in the plaintiff's department store known as the *Boston Store* in the city of Milwaukee under and pursuant to the provisions of that certain contract and lease, a copy of which is attached to the plaintiff's complaint and marked Exhibit A.

"2. That on October 2, 1911, the plaintiff served on the defendants a certain written notice, stating among other things that the plaintiff elected to cancel and terminate said contract and lease and demanding that the defendants surrender possession of the premises occupied thereunder, a copy of which notice is annexed to the defendants' answer and marked Schedule 1; that the defendants refused to comply with said notice and demand and, since October 2, 1911, to the time of the trial, the defendant *Milwaukee Apparel Company* continued in possession of said premises and operated the said departments previously operated by it, and during said time both the defendant company and the plaintiff continued to transact business with each other in the same manner as business had theretofore been transacted between them, and in general, in substantially the same manner as is provided by the terms of said contract and lease.

"3. That during the time covered by said lease the major portion of the departments in said store were owned and operated by the Herzfeld-Phillipson Company, a corporation, which also owned all the capital stock of the plaintiff corporation; that both of said corporations were under the same general management; that in several of the dealings and transactions with the defendants under said lease, the business of the lessor was conducted in the name of said Herzfeld-Phillipson Company, but during all of said time the plaintiff, *Milwaukee Boston Store,* was the owner of said lease as lessor and was also the owner as lessee of a certain other lease of the entire *Boston Store* formerly made by the John Plankinton estate to one Julius Simon, and assigned by said Simon to the plaintiff; that the plaintiff is the real party in interest

herein, and that in all the dealings and transactions between the parties hereto under said contract and lease, the said dealings and transactions of the Herzfeld-Phillipson Company were performed as the agent of the plaintiff and should be considered as acts performed by the plaintiff.

"4. That the defendants during the time they respectively operated said departments as aforesaid, and between May 1, 1907, and January 31, 1911, without the knowledge or consent of the plaintiff and in violation of the provisions of said contract and lease, sold merchandise to stockholders of the defendant company and to clerks and friends of the defendants at about the cost price thereof without reporting said sales to the plaintiff and without accounting to the plaintiff for the proceeds thereof, or commissions or rentals due the plaintiff thereon, which said sales amount to $19,761.53.

"5. That of the sales so made $19,730.27 thereof was made prior to May 31, 1910, and the violation of the provisions of said contract and lease by the defendant in respect thereto was wilful and intentional on the part of the defendants. The balance of said sale, amounting to $31.26, was made after May 31, 1910, without any wilful or intentional violation of any of the provisions of said contract and lease.

"6. That there is due to the plaintiff from the defendants as rental under said lease a commission of ten per cent. of the amount of said sales, said commission amounting to $1,976.15 principal and $362.22 interest thereon, from the date of said sales to the time of the commencement of this action, amounting in all to the sum of $2,338.37.

"7. That on September 15, 1911, the defendants informed the plaintiff of the fact that said sales had been made without being reported and without commissions paid thereon, and generally, of the nature of the transaction, but not of the amount thereof, and on September 29, 1911, the defendants furnished the plaintiff with full and reasonably accurate information as to the nature and amount of said transactions.

"8. That the plaintiff after being informed of the violations of said contract and lease on the part of the defendants, by its acts, statements and conduct at various times from September 15, 1911, to October 2, 1911, and also at various times after October 2, 1911, and after the commencement of

this action, elected to waive and did waive any right it had to declare a forfeiture of said contract and lease, and during said time treated said contract and lease as being in full force and effect.

"9. That the defendants at large expense built up a valuable trade and business in the departments of said store operated by them; that said plaintiff between May 1, 1907, and the time of the commencement of this action, collected and retained out of money in its hands belonging to the defendant company, large amounts in excess of what it was entitled to retain under its contract, said money being retained on three accounts or branches of business carried on under said contract, known as Newspaper Advertising, Charge Account, and Trading Stamp Account; that the said lease is of great value to the defendants; that the plaintiff's loss on account of the breach of said lease by the defendants is subject to computation in money damages, and that under the circumstances disclosed by the evidence it would be inequitable to permit the plaintiff to enforce a forfeiture of said lease, and the defendants, notwithstanding their breach of the contract, should be relieved from the grounds of such forfeiture by the payment or crediting to the plaintiff of the amount of said money damages.

"10. That from May 1, 1907, to October 3, 1911, the time of the commencement of this action, the defendants ordered through the plaintiff certain newspaper advertising of defendants' departments in said store; that plaintiff procured said advertising to be done and paid the newspaper proprietors therefor; that some of said advertisements so made in said newspapers were special advertisements and included only the defendants' departments in said store, and others were general and included the defendants' departments and also many other departments therein under one head reading *'Boston Store,'* the heading was followed by some general editorial matter and then the space in the advertisements was allotted specially to the different departments, and the plaintiff then apportioned the expense of these general advertisements by the measurement of the space devoted specially to each department and collected from the defendants and other department owners the cost of their special advertisements and the cost

of their proportionate share of the general advertisements based upon such measurements. Weekly statements of this cost were rendered by the plaintiff and measurements were checked over and verified by the defendants, and settlements were made on that basis from time to time during said period. In these statements and settlements nothing was included for the expense of the space in the general advertisements covered by the name plate or by the general editorial matter. The amount so paid by the defendants for newspaper advertising during said time was $51,897.51, which was a little over two and four-tenths per cent. of their gross sales. In these weekly statements the charge for newspaper advertising was designated as Advertising. These statements also included a charge called General Advertising, which was always charged to the defendant company at the rate of one and one-half per cent. of its gross sales for the time covered by the statement. This charge the defendants understood to mean a charge for the cost of the proportion of the trading stamps furnished by the plaintiff for the defendants' departments. The evidence on defendants' behalf is to the effect that the plaintiff represented that the cost of trading stamps always equaled or exceeded one and one-half per cent. of the gross sales. I find that such representations were made and that the defendants were justified in believing that the charge of one and one-half per cent. meant a charge for the trading stamps, the cost of which was represented to equal or exceed that amount. Under the conditions existing there was no other justification under the contract for a charge of one and one-half per cent. of the gross sales. During said time the plaintiff retained from the proceeds of the sales in defendants' departments an amount equal to five per cent. of the defendants' credit sales, and represented to the defendants that such charge did not exceed the cost of conducting the Credit System mentioned in the contract. Before this action was commenced the plaintiff never rendered to the defendants any statement of the cost of trading stamps or of the cost of conducting the Credit System, and no settlement was ever made between the parties of said account.

"11. That between May 1, 1907, and October 3, 1911, the plaintiff collected from the defendant company an excessive amount for the cost of trading stamps; that the true condi-

tion of said account during said period and the balance due the defendant company thereon is as follows:

To amounts collected by the plaintiff from various departments on the basis of one and one-half per cent. of sales		$158,537 41
To amount collected by plaintiff for double trading stamps		11,017 33
To deductions allowed plaintiff on cost of stamps		15,004 10
Plaintiff's total receipts		$184,558 84
By cost of trading stamps in entire store, not including deductions	$148,582 74	
By plaintiff's cost for advertising stamps	2,638 26	
By salary of clerks in disbursing stamps	3,107 99	
Plaintiff's total expenses	$154,328 99	$154,328 99
To balance		$30,229 85

"That during said time the total sales in said store amounted to $10,569,160.93 and that during said time the total sales of the defendants' departments in said store amounted to $2,188,185.97; that under the evidence in this case the proportionate share of the excessive charge for trading stamps to which the defendant company is entitled is 20.7 per cent. of said sum of $30,229.85, which amounts to $6,257.57.

"12. That prior to October 3, 1911, the plaintiff accumulated out of the money derived from the charge of five per cent. on the credit sales in said store a fund more than sufficient to pay the expenses of said Credit System; that prior to said date excessive charges for salaries to the amount of $5,000 were made and deducted from said fund; that on January 31, 1911, $9,190.43, the then credit balance of said fund as it then appeared on plaintiff's books, was transferred on said books to a certain other account referred to as a reserve account to cover bad debts, which transfer was a mere matter of bookkeeping and in no manner changed the rights or liabilities of the parties; that on January 31, 1911, there was charged to said account the sum of $1,350 as rent from August 1, 1910, to August 1, 1911, of the part of the store used by clerks in conducting the credit business, at the rate of $1.50 per square foot for floor space; that the cost to the plaintiff for rent, light, heat, power and janitor service in said store was about $24.81 per square foot, and this charge

was excessive as to the rate thereof, but as no rent charge had theretofore been made for said purpose, I do not find the charge to be excessive for the entire period for which such space was used in conducting said business; that the credit balance of said charge account on plaintiff's books on October 1, 1911, was $2,807.61; that the proportionate amount of said fund which was contributed by the defendant company and to which said defendant is entitled on a distribution thereof, is 27 per cent. thereof; that considering the history of said account, the percentage of recoveries made from time to time from debts charged to profit and loss, the manner in which said fund has been accumulating, and all other evidence on the subject, I find that $2,000 of said fund is a reasonable amount to retain therein and reasonably sufficient to cover all losses which said account will probably sustain in the future over its receipts; that the parties by their contract did not contemplate that said fund should be allowed to accumulate to an amount sufficient to equal all outstanding credit accounts or all possible future losses, nor did they contemplate that the entire credit balance should be distributed whenever a small credit balance happened to exist; that all of said fund in excess of $2,000 should be distributed to the parties entitled thereto; that the amount thereof due the defendant company is as follows:

Balance transferred to Reserve Account January 31, 1911	$9,190 43
Excessive charge for salary	5,000 00
Balance of account on books October 1, 1911	2,807 61
Credit balance of fund October 1, 1911	$16,998 04
Reserved to cover losses	2,000 00
Balance to be distributed	$14,998 04
Amount due defendant company, twenty-seven per cent.	$4,049 47

"13. That the plaintiff between January, 1909, and September, 1911, was allowed on its expenses for newspaper advertising by the Journal Company a discount of two per cent. of the face of its bills, which discount amounted to $1,520.13, and between July 6, 1909, and May 16, 1910, the plaintiff received from the Evening Wisconsin Company money amounting to $3,411.40 as a deduction on its advertising bills because of the fact that said newspaper had charged plaintiff for advertising an amount in excess of what it had charged one of plaintiff's competitors for like service; that the plaintiff collected from the defendant company, without

its knowing of said facts, the full amount of the bills rendered for advertising chargeable to it without making any allowance for said discounts and deductions; that said charges were excessive, and there is due from the plaintiff to the defendant company as its proportionate share of said amounts so recovered by the plaintiff, eighteen per cent. thereof, amounting to the sum of $887.67.

"14. That the defendants offered no proof to sustain the allegations of their second, third or fourth counterclaims, and said counterclaims are unproven and untrue."

As conclusions of law the court found:

"1. That the plaintiff is not entitled to any judgment enforcing a forfeiture of the contract or ratifying any attempted forfeiture thereof, or for a recovery of possession of the leased premises.

"2. That the weekly settlements made for newspaper advertising preclude the plaintiff from recovering from the defendants any amount on account of the proportionate cost of the space occupied by the name plate and editorial matter included in the general newspaper advertisements, even if such charge would otherwise have been proper.

"3. That there is due the defendant company:

As per finding No. 11	$6,257 57
As per finding No. 12	4,049 47
As per finding No. 13	887 67
Amounting to	$11,194 71
Less amount due plaintiff of	2,338 37
Leaving a balance due the defendant company	$8,856 34

"For which amount of $8,856.34, with interest thereon from October 3, 1911, at six per cent. per annum, the defendant company is entitled to judgment against the plaintiff, together with the defendants' costs in this action, to be taxed."

Judgment in conformity with the findings of fact and conclusions of law was duly entered. The plaintiff appealed from the entire judgment which denied the relief asked for in the complaint and which gave the defendants judgment in the sum of $9,795.79. The defendants appealed from the judgment in their favor in so far as it failed to give them a larger amount, to wit, the sum of $13,515.45.

For the plaintiff there were briefs by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *Charles F. Fawsett, James G. Flanders,* and *George P. Miller,* of counsel, and a separate brief in reply by *George P. Miller,* of counsel, and oral argument by *Mr. Fawsett* and *Mr. Miller.* They contended, *inter alia,* that by the service of the notice on October 2d the plaintiff in unequivocal terms elected to terminate the contract, and the demand for possession contained therein was equivalent in law to a re-entry. *Mash v. Bloom,* 133 Wis. 646, 652, 653, 114 N. W. 457; *Harmon v. Pohle* (Ind.) 92 N. E. 119; *Alexander v. Hodges,* 41 Mich. 691, 694, 3 N. W. 187; *Johnson v. Electric P. A. Co.* (Iowa) 130 N. W. 807; *Jones v. Carter,* 15 M. & W. 718; *Davis v. Moss,* 38 Pa. St. 346; *Ray v. Western Pa. N. G. Co.* 138 Pa. St. 576, 20 Atl. 1065; *Sheaffer v. Sheaffer,* 37 Pa. St. 525; *Hamilton v. Elliott,* 5 S. & R. 375. The acceptance of rent after a forfeiture has actually been declared and perfected by a re-entry or its legal equivalent, or after action for recovery of possession, is not a waiver. 24 Cyc. 1363; 18 Am. & Eng. Ency. of Law (2d ed.) 387; *Cleve v. Mazzoni* (Ky. App.) 45 S. W. 88; *Jones v. Carter,* 15 M. & W. 718, 725; *Schlitz B. Co. v. Nielsen,* 77 Neb. 868, 110 N. W. 746, 8 L. R. A. N. S. 494; *Croft v. Lumley,* 6 H. L. Cas. 672, 713, 744, 745. To allow the defendants to prevail on the ground of a waiver under the circumstances would be to permit them to take advantage of their own wrong. In such a case, the rule that "the burden of proof is upon the party claiming the waiver" should be strictly applied and enforced. 40 Cyc. 269. The contract by its terms (paragraphs 8, 17) clearly contemplated that, upon its termination either by forfeiture or lapse of time, the business, pending the transfer of possession by the defendants, should be continued without interruption. The court should have put an end to the contract and wound up the affairs of the parties by the mutual accounting asked for, even if there had been no express provision for the termination of the contract. 30 Cyc. 656, 657; *Singer v. Heller,* 40 Wis.

544 547; *Wood v. Beath,* 23 Wis. 254; *Adams v. Shewalter,* 139 Ind. 178, 38 N. E. 607; *Barnes v. Jones,* 91 Ind. 161, 165, 166; *Fogg v. Johnston,* 27 Ala. 432, 62 Am. Dec. 771; *Bruce v. Ross,* 18 La. 341; *Seighortner v. Weissenborn,* 20 N. J. Eq. 172; *Flammer v. Green,* 47 N. Y. Super. Ct. 538.

For the defendants there were briefs by *Frank M. Hoyt,* attorney, and *Thomas M. Kearney* and *Glicksman, Gold & Corrigan,* of counsel, and oral argument by *Mr. Hoyt, Mr. Glicksman,* and *Mr. Kearney.* They argued, among other things, that the plaintiff's conduct effected a complete waiver of the forfeiture. Any act in affirmance of a contract by the party entitled to forfeit or rescind constitutes a waiver of that right. *Gomber v. Hackett,* 6 Wis. 323, 324; *Jolly v. Single,* 16 Wis. 280, 290; 24 Cyc. 1360, 1361; *Conger v. Duryee,* 90 N. Y. 594; *Collins v. Hasbrouck,* 56 N. Y. 157; *Goodright v. Davids,* Cowp. 803; *Webster v. Nichols,* 104 Ill. 160; *Levy v. Blackmore* (N. J. Eq.) 67 Atl. 1022; *Bridges v. Longman,* 24 Beav. 27; *Watson v. Fletcher,* 49 Ill. 498; *Camp v. Pulver,* 5 Barb. 91; *Clarke v. Cummings,* 5 Barb. 339; *Bowling v. Crook,* 104 Ala. 130, 16 South. 131, 132; *Brooks v. Rodgers,* 99 Ala. 433, 12 South. 61; *Little Rock G. Co. v. Shall,* 59 Ark. 405, 27 S. W. 562; *Smith v. Edgewood C. Club,* 19 R. I. 628, 35 Atl. 884; *Doe v. Meux,* 4 B. & C. 606, 10 Eng. Com. Law, 417, 15 Eng. Rul. Cas. 760; *Doe v. Lewis,* 5 A. & E. 277, 31 Eng. Com. Law, 333; *Dendy v. Nichol,* 4 C. B. N. S. 376, 93 Eng. Com. Law, 376, 381, 15 Eng. Rul. Cas. 783; *Crouch v. W., St. L. & P. R. Co.* 22 Mo. App. 315; *Ward v. Day,* 4 B. & S. 337, 5 B. & S. 359, 33 L. J. Q. B. 254; *Rump v. Schwartz,* 56 Iowa, 611, 10 N. W. 99; *Deyoe v. Jamison,* 33 Mich. 94; *McKildoe's Ex'r v. Darracott,* 13 Gratt. 278; *E. H. Powers S. Co. v. Odd Fellows Hall Co.* 133 Mo. App. 229, 113 S. W. 253, 258. The reception of rent by the landlord after being advised of the breach of condition is a complete waiver of the breach, and reinstates the lease, even though such rent is accepted after notice of declaration of forfeiture is given. *Gomber v.*

Hackett, 6 Wis. 323; *Kenny v. Seu Si Lun,* 101 Minn. 253, 112 N. W. 220; *Michel v. O'Brien,* 6 Misc. 408, 27 N. Y. Supp. 173; *Dahm v. Barlow,* 93 Ala. 120, 9 South. 598; *Goodright v. Cordwent,* 6 Term Rep. 219; *Stromberg v. Western T. C. Co.* 86 Ill. App. 270. That the lessor knows there has been a breach of condition is sufficient to make the subsequent acceptance of subsequently accruing rent a waiver. It is not necessary that he know all the details. *Trauerman v. Lippincott,* 39 Mo. App. 478. Where a right of rescission or to claim or insist upon a forfeiture has been waived, it cannot be revived upon the discovery of a new incident of the fraud or other ground. There is no authority for saying that a party must know all the incidents of the grounds relied upon before he deprives himself of the right of rescinding. *Croft v. Lumley,* 5 El. & Bl. 648, 681; *Campbell v. Fleming,* 1 Ad. & El. 40, 28 Eng. Com. Law, 29; *Upton v. Tribilcock,* 91 U. S. 45, 54; *Bach v. Tuch,* 126 N. Y. 53, 26 N. E. 1019; *Greenwood v. Fenn,* 136 Ill. 146, 26 N. E. 487, 490; *Wilson v. Hundley,* 96 Va. 96, 101, 30 S. E. 492, 494, 70 Am. St. Rep. 837, 842.

The following opinion was filed April 8, 1913:

VINJE, J. The questions raised by plaintiff's appeal upon its cause of action are these: (1) Did plaintiff have an adequate remedy at law by an action of unlawful detainer? (2) Did the defendant incur a forfeiture of the contract and lease by failing to report the so-called cost sales? (3) Did plaintiff waive the forfeiture? and (4) Are defendants entitled to equitable relief therefrom?

For a proper understanding of the questions of law and fact involved in this case a brief description of the *Boston Store* and of its method of transacting business is deemed necessary. A concise and correct description thereof is contained in plaintiff's brief, and its language, with only minor variations, is for convenience adopted. The *Boston Store* contains about seventy departments operated by department

managers under contracts with the plaintiff in the nature of leases, providing for a joint contribution by the parties to the conduct of the business and for a division of the proceeds between them. It is conducted in a five-story and basement building on Grand avenue, Milwaukee. The entire building is under lease by the plaintiff from the Plankinton estate for the purpose of conducting the business which is being carried on therein. The store was started by one Julius Simon in 1900, who took the lease from the Plankinton estate. In 1904 he organized the *Milwaukee Boston Store* and transferred the lease of the building and all his interest in the business to this corporation and had all the stock of the company issued to himself. Simon continued in the active management and control of the store until October, 1906, when he transferred all the stock thereof to the Herzfeld-Phillipson Company, another corporation which at the time was operating several departments in the store. Since then Simon has had nothing to do with the store. The control and management thereof has been in the Herzfeld-Phillipson Company as the owner of the capital stock of the plaintiff, which has continued to hold the lease from the Plankinton estate. The *Boston Store* has continued to maintain its separate organization, make all subleases of the departments therein and, through its own officers and employees, and the Herzfeld-Phillipson Company acting for it, has continued to conduct the business of the store as the lessor of all the departments and to participate in the conduct and management of the business in the manner and to the extent provided in the various contracts under which the departments are conducted. In the organization and arrangement of the store a certain amount of space is set apart for the conduct of the business of each department in accordance with the provisions of the contract under which the business of the department is conducted, and the lessee of the department is required to confine his operations to that particular space and to sell thereon

only the class or classes of goods specified in his contract and lease. The several departments are not shut off from each other as separate stores. The same aisles and passageways used in one department continue through the other departments on the same floors and all use the same common entrances to the building and the same elevators, making, so far as the physical arrangement is concerned, one large store. Each department lessee buys the goods for his department, keeps up his stock, and hires his own clerks to sell the goods to the customers on the floor of the department. The *Boston Store,* besides providing the space and furnishing light, heat, elevator and janitor services, supervises and has the right to dictate the arrangement and display of the stock in the different departments. It makes rules and regulations for the conduct of the business, passes on all credits to customers, assumes and collects all accounts, maintains a credit and accounting department for the entire store, takes charge of bundles, and delivers through a regular delivery system all goods sold. It receives the proceeds of all sales, accounting to the lessees of the departments at intervals for their share thereof, conducts and controls the entire advertising, and exercises general supervision and control over the entire business. For the space provided and for its entire contribution to the business the *Boston Store* retains under its various contracts with the lessees of the departments certain percentages of the proceeds of sales, all of which, under the terms of the contracts, must pass through its hands. All business is required to be done in the name of the *Boston Store,* and for the purpose of keeping track of all sales and to see that all transactions go through the proper channels from the sale of the goods to the delivery to the customer, and for the purpose of insuring a proper accounting, a uniform system of rules and regulations has been established which every department in the store is required to observe. This system is as follows: The clerk making a sale is required to make out

duplicate sales tickets on which is entered the description of the article, the price at which it was sold, whether it was a cash or credit sale, and the name and address of the customer. These tickets with the article and also the money, in case of a cash sale, are sent to a cashier of the *Boston Store,* who sits at a desk conveniently located and whose duty it is to make the proper inspection of the checks, stamp them, and pass one with the article on the bundler's desk to be bundled and sent out. If the sale was a cash sale she retains the money, and in any case one of the duplicate tickets is retained properly stamped and sent to the auditing department, where the proper record is kept.

1. The defendants contend that the relation of the parties was that of landlord and tenant and therefore plaintiff had an adequate remedy at law by an action of unlawful detainer. This defense was specifically pleaded by them in their answer and is insisted upon in this court. Our attention is called to that part of the prayer for relief which reads, "That it be adjudged and decreed that the plaintiff is entitled as against the defendants . . . to the possession of the premises referred to in or covered by said agreement and lease, and that the defendants be ordered and adjudged to quit and surrender the same to the plaintiff, and that they be permanently and forever enjoined from interfering with the possession of said premises by the plaintiff," and to the fact that just such relief is prayed as would be covered by the judgment rendered in an action of unlawful detainer. We are also referred to eighteen or more clauses in the agreement where the term *lease* is used or where language is employed that is strictly germane to the terms of a lease, and the case of *Porter v. Merrill,* 124 Mass. 534, is cited to the point that "the possession and control of the premises must pass to the tenant, but such possession need not in all cases be complete or exclusive." That was a case where the plaintiff had rooms in an apartment house known as the Bellevue, which also contained a

restaurant in which he could take his meals or not as he elected. The lease provided for a specified charge per meal if served in plaintiff's rooms, and contained a prohibition against cooking therein and also some further restrictions as to their use. The court said:

"The written contract declared upon purports to be a lease, for a precise time and at a definite weekly rate, of certain specific rooms, so separated from all other rooms in the same house as to become in fact and in law the separate tenement of the lessees. . . . The fact that, besides leasing the rooms, the lessor undertakes to furnish certain specific accommodations, and imposes certain restrictions as to the manner in which the premises are to be occupied or used, does not change the essential character of the instrument."

It is evident there was no joint possession in that case. As bearing upon the claim that the contract between the parties was a lease, the cases of *Oliver v. Moore,* 131 N. Y. 589, 30 N. E. 67, affirming same case reported in 53 Hun, 472, 6 N. Y. Supp. 413; *Fiske v. Framingham Mfg. Co.* 14 Pick. 491; and *Jordan v. Indianapolis W. Co.* 159 Ind. 337, 64 N. E. 680, are cited. It is sufficient to say of them that they are so variant in their facts from the case at bar that they are practically valueless as authorities upon the question before us.

It is true that the agreement is in a certain sense a lease, but it is more than that. It provides for the carrying on of a joint business in which plaintiff furnishes the space, does the bundling and the delivery, and has charge of credits, advertising, and the general conduct of the business, and the defendants buy the goods, make the sales, hire and pay the clerks, turn over the money on cash sales to plaintiff to be by it accounted for later, and out of the gross proceeds of the sales the plaintiff retains ten per cent. as its compensation for the space furnished and services rendered, not including certain services in the credit and advertising departments. There is also a joint possession of certain aisles and ap-

proaches in the store, and the plaintiff retains the key thereof, though all the space leased is within it. Joint show windows are to be decorated under the direction of plaintiff, suitable regard being had to the reasonable wishes of the defendants. And as to bargain sales, it is provided the plaintiff may buy goods for the same if the defendants decline to do so. Many other features of the agreement could be adverted to for the purpose of showing that it is more than a lease. It creates such business and fiduciary relations between the parties as to be more properly denominated a partnership or *quasi*-partnership agreement than a lease. The plaintiff held joint possession with the defendants of certain portions of the space, and in a sense had the physical control of all of it, for by locking the doors it could exclude the defendants therefrom and compel them to resort to legal process to regain possession. So it is evident that an action of unlawful detainer would not give plaintiff the relief prayed for, or to which it would be entitled under evidence sustaining the allegations of the complaint. An accounting involving complicated business relations covering a number of years is also asked for. In fact the suit partakes more of the nature of the dissolution of a partnership and the settlement of the account between the parties than the mere adjudication of the right of possession of the space in plaintiff's store. It is therefore deemed that plaintiff did not have an adequate remedy at law and that the suit was properly brought in equity.

2. The defendants argue that the cost sales were not sales for which they were required to account or pay a commission upon. In support of this they rely upon evidence showing that a custom had obtained for a long time in the store permitting sales to clerks and managers at cost, and that such sales were not reported to plaintiff. The latter denies that it was aware of the custom, and while it concedes that the owners of the department might perhaps be entitled to take out goods for themselves and the members of their families

such right did not extend to clerks and friends of owners and employees. The terms of the agreement are that the defendants will pay to plaintiff "ten per centum (10 %) on the gross sales of said department." This is the measure of plaintiff's compensation for the space furnished and services rendered by it. And it is evident that such compensation cannot be arbitrarily or unreasonably diminished by the defendants without its consent. The agreement further provides that "all merchandise sold in said department and money received from sales shall be immediately delivered to and handled by the cashier of the party of the first part." The terms "gross sales" and "all merchandise sold" are broad and comprehensive enough to include cost sales to employees. It could certainly not have been the intention of the parties that plaintiff was to receive a commission only on sales made at a profit, for if that were so, the agreement would undoubtedly have contained apt terms expressing such intention. It is a matter of common knowledge that a certain class of goods at times is sold at cost or less to the general public, but such sales are none the less sales within the meaning of the agreement. Whether or not a certain transaction constitutes a sale is entirely independent of the element of a profit to either party to the transaction. Therefore, when defendants sold goods to their employees they made a sale thereof just as much as if they had sold them to the public, and plaintiff was entitled to a commission upon such sales irrespective of whether or not the defendants made a profit upon them. The evidence shows that over $1,200 worth of goods were sold to others than employees and owners of the department.

But it is claimed that even if these cost sales were within the terms of the agreement a failure to report them did not work a forfeiture, because such failure was not wilful or intentional. The evidence on this branch of the case is somewhat conflicting, and, since the trial court has found in favor of the plaintiff upon such issue, it remains only to examine

the evidence to see if it is sufficient to sustain the finding. We shall not review it at any length, but only refer to a few salient points therein that show the finding is based upon sufficient evidence. Practically all of the goods so sold were bundled and delivered by the defendants themselves. They were not sent to the cashier's desk at all, and plaintiff was precluded from knowing anything either as to the quantity or value of goods so sold. When credit was given no report thereof was made to the credit department, nor was plaintiff allowed to pass upon the question of credit as provided for in the agreement. The true nature of the sales was concealed by entering all goods so sold in the "Return Merchandise Account" at first, and later in an account under the name of "M. Phillipsborn." No adequate explanation was given by the defendants of such method of bookkeeping. The evidence also showed that part of the defendants' books relating to their sales had been destroyed, but a fairly satisfactory explanation of such destruction was given. From the whole evidence we are satisfied that the trial court properly found that an intentional effort was made by the defendants to conceal these sales from plaintiff, both by the manner in which the goods were bundled and delivered and by the manner in which their true nature was concealed by the method of bookkeeping resorted to. It is plain that a cost sale to any one should not be entered in the account of "Merchandise Returned," and the explanation that it was so entered because there was no profit in it is entirely inadequate, coming as it does from men experienced in business and bookkeeping. The defendants knew the agreement entitled plaintiff to ten per cent. commission on all sales; that all sales were required to be reported to plaintiff and go through the regular channels of its business; and that it had no means of knowing what the sales were or of collecting commissions thereon unless they were reported. When, therefore, in the face of such knowledge, they actually concealed such sales from plaintiff

both by the manner in which the bundling and delivery was done and by the manner in which the books were kept, they must be held to have intentionally violated the terms of the agreement. So we conclude that the finding of the trial court to the effect that the cost sales made by the defendants prior to May 31, 1910, and aggregating $19,730.27 were in violation of the provisions of the agreement and were wilfully and intentionally concealed by them from the plaintiff, is supported by the evidence.

3. It appears from the evidence that on September 15, 1911, plaintiff was first informed by the defendants of the fact that they had made unreported sales to employees. The evidence as to the extent of the disclosure is somewhat in conflict. Plaintiff contends that the defendants represented the sales were quite trivial in amount, while the defendants claim that, although no amount was stated by them, yet the impression conveyed to the plaintiff was not that the sales were entirely trivial in amount, and they claim that Mr. Stone, acting on behalf of the plaintiff, in reply to a statement made by Mr. Hoyt, who represented the defendants, that they were willing to submit a report of such sales and pay a commission thereon if desired, said: "That is not necessary; we don't desire it." This much, however, remains certain: No definite conclusion or agreement was arrived at on that date. On the 19th of September the plaintiff by a letter to the defendants stated:

"In order that we may be fully advised as to the nature and extent of the transactions of this character, we would respectfully request that you furnish us at once with as full and complete statement as you are able to give, showing the dates, number, and amounts of such transactions and the period over which the same have extended."

The defendants immediately replied to this letter, stating they would comply with its request but that it would take some time to prepare the required statement. On September

29th the defendants furnished such statement to the plaintiff, and then, for the first time, it learned of practically the full amount of unreported sales, except as to a correction made thereto October 3, 1911, which increased the amount of $17,836.75 reported to $19,730.27.

The defendants claim that the plaintiff, after full knowledge of all the facts and circumstances relating to the breach of the agreement, has waived the same: (1) By negotiating with the defendants on September 18th for an extension of the lease to cover additional space; (2) by continuing to do business under the lease, receiving all the benefits thereof without any notice whatever to the defendants until the afternoon of September 19th; (3) by continuing to do business under the lease, receiving all the benefits thereof from September 19 to October 2, 1911, without notice of any intention to declare a forfeiture; (4) by continuing to do business and exacting and receiving from the defendants all the benefits and payments due it under the lease from October 2, 1911, down to the commencement of the action, after it had been notified by the defendants that its claim of forfeiture of the lease was without foundation and that they would continue to keep the premises thereunder and that they insisted upon the plaintiff performing the duties imposed upon it by the lease; and (5) by exacting and receiving from the defendants, after the commencement of the action and in January, 1911, money for a sprinkling charge for a period ending in the month of June, 1912, as part of the compensation for the use of said premises for that period.

It is quite apparent from any version of the testimony that plaintiff was not fully informed as to the extent of the unreported cost sales until September 29th. That the extent of such sales might materially influence it in determining whether or not it would insist upon a forfeiture is quite apparent. It might be willing to overlook a trifling breach

when it would not tolerate a substantial one. It is elementary that a waiver must be predicated upon the intentional relinquishment of a known right. *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 85 N. W. 685. And it is obvious that in order to constitute a known right the substantial facts and circumstances out of which the right springs must be known. Here the plaintiff was not substantially in possession of such facts and circumstances till September 29th. It acted quite promptly in demanding a full disclosure of the facts. And after it was in possession thereof it was entitled to a reasonable time to consult counsel and consider the situation, as to what should be done. That it took seasonable action after the 29th of September cannot be doubted. Hence no waiver can be predicated upon its acts prior to September 29th, and none upon its failure to act promptly thereafter.

But the question whether its acts subsequent to October 2d do not in fact constitute a waiver of the forfeiture is more serious. A large number of cases are cited by the defendants showing that the receipt of rent by a landlord after a breach constitutes a waiver thereof. For reasons already stated these cases have only a partial or qualified application, since the relations between the parties are not solely those of landlord and tenant. As will be seen by a reference to plaintiff's letter of September 30th giving notice of a cancellation of the agreement, it offered to continue to transact the business of the department in the manner in which it had theretofore been transacted, without prejudice to its right to insist upon a forfeiture, until a surrender was made by the defendants as therein required. And in its letter of October 4th it gave notice "that pending the determination of the action which has been begun to enforce the rights of the *Milwaukee Boston Store* in the premises, all goods sold by you from said department and delivered to us will be accounted for and handled by us, and the business of said department, regardless of the contract which has been terminated, will be conducted on our

part substantially as heretofore, except that we shall apply to the court as soon as practicable for an order authorizing the deposit, until the surrender by you of said department, of the proceeds of such sales or so much thereof as may be sufficient to indemnify us against loss or damage sustained by us and which may hereafter be sustained by reason of your unlawful withholding from us of the possession of said department to which we are now entitled. And in the meantime and until such order shall be made the percentages of the proceeds of sales which we shall retain as heretofore will be applied on account of such loss and damage." Defendants' reply to plaintiff's letter of September 30th contained an unqualified refusal to surrender possession and notified it that they should continue to hold under their lease, and demanded of the plaintiff that it continue the performance of the duties imposed upon it thereunder.

The plaintiff never applied to the court for the order mentioned in its letter of October 4th. So if it held the percentages of the proceeds of sales as damages at all, it held the same by virtue of the right declared in the last sentence of said letter. It is a little difficult to understand just what is meant by such sentence, taken in connection with the previous statement in the letter that the business would be conducted substantially as theretofore. Under the previous conduct of the business plaintiff was entitled to retain ten per cent. on all sales as its share of compensation for space furnished and services rendered. If the business was continued the same as before it was entitled to retain the like percentage for such space and services, and there would be nothing left to apply towards damages for withholding possession. That the business continued to be conducted after the action was begun and down to the time of the trial precisely as it had been from the inception of the agreement, was conceded upon the trial and so found by the court. Plaintiff therefore retained no money in its hands out of sales made subse-

quent to the commencement of the action out of which it could reimburse itself for damages. The defendants by unequivocal language notified plaintiff that they should continue to hold under the agreement. This was equivalent to informing it that the ten per cent. retained should be applied upon the amount due it for the use of the space and the services rendered by it pursuant to the agreement. Admitting that the defendants owed plaintiff damages for withholding possession, they also owed it ten per cent. on sales made, hence they as debtors, and not the plaintiff as creditor, had the right to say upon what debt the money they turned over to plaintiff should be applied. *Jones v. Williams,* 39 Wis. 300; *Kehl v. Smith,* 87 Wis. 212, 58 N. W. 244. Having declared that it should be applied upon the debt for space and services, which debt the plaintiff never waived, the latter could not apply it upon any other debt or hold it for other purposes. The plaintiff, therefore, with full knowledge of the facts, retained the ten per cent. as the compensation provided in the agreement, and not to indemnify it for damages.

There is much force in plaintiff's argument that great loss would accrue to it by a sudden termination of business relations between the parties, and that it ought not to be subjected to such loss as a condition of insisting upon the forfeiture. On the other hand, should plaintiff be permitted to reap the benefits of the agreement and at the same time claim that it was canceled? The loss to the defendants from a sudden termination of business relations and their loss after a short prolongation thereof would not differ very materially, while to the plaintiff, if it could continue the business uninterruptedly, the difference would be very great. In the latter case it might sustain practically no loss at all, while in the former it might seriously affect its whole business for a time. When it elected to break with the defendants it was incumbent upon it to weigh the advantages and disadvantages of the situation. It ought not to be permitted to accept the advan-

tageous part, namely, that of securing control of defendants' business, and at the same time compel them to accept its terms of a temporary continuance thereof in order that it might relieve itself from the consequent loss of flatly standing upon its right of forfeiture. When declarations and conduct are at variance, as here, the conduct and acts of the party must be held to outweigh the declarations and be controlling. For these reasons it is considered that the plaintiff, by its continuing the business with the defendants in the manner and under the circumstances stated after October 2, 1911, waived the forfeiture.

4. Having held that plaintiff waived the forfeiture, it perhaps becomes unnecessary to determine whether the defendants would be entitled to equitable relief in the absence of a waiver. In view of the importance and peculiar circumstances of the case, however, we prefer to base our decision upon both grounds. It is the settled doctrine of this state that equity will relieve against a forfeiture resulting from a condition broken where such condition was intended as security for the payment of money. *Gates v. Parmly,* 93 Wis. 294, 66 N. W. 253, 67 N. W. 739; *Maginnis v. Knickerbocker Ice Co.* 112 Wis. 385, 88 N. W. 300; *Raddatz v. Florence Inv. Co.* 147 Wis. 636, 133 N. W. 1100. And especially is this so where full compensation can be made by a money judgment. In this case the agreement between the parties provided that it should become void and all rights of the second party thereunder should immediately cease if the second party should wilfully and intentionally violate any of the covenants, promises, or agreements therein contained. The defendants in failing to report the cost sales and at once turn over to the plaintiff the proceeds thereof violated the condition of the agreement which required them to do so. That the condition violated was one that was intended as security for the payment of the ten per cent. due plaintiff under the agreement cannot well be doubted. Its purpose is aptly

stated on page 54 of plaintiff's brief, as follows: "The provision for payment of ten per cent. commission, read in connection with the other provisions of the contract, merely measured the amount the plaintiff was entitled to retain. The *payment* was secured by the requirement that the specific proceeds of the sales were to be turned over immediately to the plaintiff." We have therefore a case where the condition broken is one that was intended as security for the payment of money, and also where money can fully compensate its breach. It is then within the field of equitable relief.

Let us now briefly review the situation of the parties and consider the relative hardships that would result by granting or refusing to grant relief, and also the relative delinquencies of the parties towards each other in their dealings under the agreement. As will be seen from the findings of the trial court, contained in the statement of facts, between May 1, 1907, and October 3, 1911, the total sales in defendants' department amounted to $2,188,185.97. Their agreement does not expire till 1922, and they have an option for a further extension at that time under certain contingencies. That good judgment and splendid management have gone into the creation of a business of such magnitude is self-evident. The good will thereof is of great value, and if plaintiff could succeed to it unimpaired it would be greatly enriched thereby. Were the defendants required to vacate the premises they could not carry any great portion of the business with them. The result would be that plaintiff would reap a large benefit from the established business and the defendants practically none. That plaintiff, too, by good judgment and business ability has aided in its creation may be freely conceded. But the fruits of the joint effort should not all go to one party except for grave cause.

The delinquency of the defendants in failing to report the cost sales is established. And for the purposes of the case we will assume that no excuse exists to mitigate it except the

fact that the custom was promptly discontinued when they were advised that such sales were in violation of the agreement. On the other hand, the plaintiff's conduct is not altogether such as to appeal strongly to the conscience of the court. It withheld from defendants the fact that it had secured substantial rebates on advertising contracts, eighteen per cent. of which belonged to them, amounting in all to $887.67. It failed to disclose to them the true cost of the credit department and had entered up against it $5,000 in excessive salaries, $3,000 of which went to plaintiff's president. The total moneys belonging to the defendants which it kept back as to this item were $4,049.47. It retained in its possession the sum of $6,257.57 due the defendants on an overcharge in the trading-stamp account. It is not necessary to say that these sums were fraudulently withheld from the defendants. It is sufficient to say that they were withheld, and the first, at least, without any pretense of right. Viewed in connection with these acts of plaintiff, the failure of the defendants to report sales upon which the plaintiff was entitled to a commission of $2,338.37, including interest, does not call so loudly for the forfeiture of a business whose value renders their omission almost trivial by comparison. It was no doubt with this idea in mind that the learned trial judge said that "under the circumstances disclosed by the evidence it would be inequitable to permit the plaintiff to enforce a forfeiture of the lease." The conclusion reached upon all the facts in the case is that, had there been no waiver of the forfeiture by the plaintiff, equity would relieve against it.

The questions arising upon the counterclaim relate to three separate accounts, known as Newspaper Advertising, Trading Stamp Account, and Charge Account. These are fully set forth in the trial court's findings numbered 10, 11, and 12, respectively, included in the statement of facts, to which reference may be had for a fuller understanding thereof. We have carefully examined the statement of these accounts

and the evidence relative to the same and have reached the conclusion that the accounting as made by the trial court should not be disturbed. To restate the accounts here and give in detail the reasons for the conclusions reached as to the numerous items would unreasonably and uselessly extend this opinion.

Under the provisions of the agreement between the parties and the practical construction given it by them since its inception, the trial court properly refused to reimburse plaintiff for the amount of money it had paid newspapers for headplates and editorials relating generally to the *Boston Store,* and not to any specific department. Nor could the cost of the trading stamps be charged to this class of general advertising, though plaintiff's books showed that it was. The use of trading stamps constituted a special form of advertising and was separately provided for in the agreement and a maximum limitation of one and one-half per cent. of the gross sales fixed. It may be conceded that an absolutely accurate account of the cost of trading stamps to each department could not be stated. But facts were at hand which made it possible to state an account substantially accurate, and that was done by the trial court.

As to the Charge Account, the court under the evidence properly disallowed excessive salaries in the sum of $5,000 for extra managerial services. It also did not abuse its discretion in retaining the sum of $2,000 in the account as a reserve fund. Under the evidence showing rapid increases of late years in the credit balances of this account, that sum would seem to be sufficient.

The defendants claim the court erred in allowing plaintiff commissions on the cost sales not reported, amounting to $2,338.37; in allowing plaintiff clerk hire in the stamp department to the amount of $643.35; in allowing an excess salary charge in the credit department of $810, and a rent charge therein of $364.50; in refusing to allow them interest

on credit balances in the credit department amounting to $436.11, and in refusing to give them interest on overcharge in advertising to the amount of $56.80, in all the sum of $4,649.13. Though plaintiff concedes that if it is proper to undertake to determine any of the counterclaims in this action the defendants may be entitled to interest on the Journal overcharge amounting to $22.57, we think the court properly disallowed it in view of the manner in which the mistake was made by plaintiff in not sooner refunding the overcharge. As to other claims made by the defendants upon this appeal, it appears that the findings of the trial court upon them are sustained by the evidence and ought not to be set aside.

By the Court.—Judgment affirmed on both appeals. No costs allowed to either party, except that the defendants shall recover clerk's fees and cost of printing not to exceed $75.

SIEBECKER, J., took no part.

A motion for a rehearing was denied, with $25 costs, on May 31, 1913.

VAN DINTER, Respondent, vs. WORDEN-ALLEN COMPANY, Appellant.

November 22—December 10, 1912.
May 3—May 31, 1913.

Master and servant: Injury from unsafe hoisting apparatus: Assumption of risk: Warning of danger: Questions for jury: Pleading: Amendment to conform to proof: Special verdict: Inconsistency.

1. Plaintiff, a carpenter employed by defendant, was engaged with others in raising heavy beam joists to the third story of a building by means of a hoisting apparatus consisting of a block and tackle attached to a so-called horse, the legs of which rested upon planks lying upon and projecting a little in front of the

joists already set in place. As he stood waiting to receive a joist which the men below were so raising, one of the planks upon which the horse rested tilted up at the rear, swung around, and knocked him from the timber on which he was standing, so that he fell to the ground and was injured. Upon the evidence—which tended to show, among other things, that plaintiff had adjusted the apparatus as directed by defendant's superintendent; that he had had no experience with a hoist like this one, and had only observed the operation of raising one joist, which came up safely; and that at the time of the accident the men below at the rope, instead of pulling directly downward, pulled sidewise towards the plank which tilted—it is *held* that the question of plaintiff's contributory negligence or assumption of the risk was one for the jury.

2. The complaint did not charge that defendant was negligent in failing to warn plaintiff of the unsafe conditions, but before the special verdict was submitted a motion was made that the complaint be amended to conform to the evidence on that subject. The court did not then specifically decide such motion, but stated that it would do so, and then proceeded to submit the issues as if the pleading were so amended, and subsequently treated the case as though the amendment were allowed. *Held*, that this was equivalent to allowing the amendment, and that the question as to whether defendant should have warned the plaintiff was properly included in the special verdict.

3. A master is under no obligation to warn a servant of dangers which are open and obvious to a person of the servant's experience and understanding.

4. Findings in a special verdict to the effect that it was the master's duty to warn a servant as to certain dangers, and that the servant in the exercise of ordinary care ought to have known and appreciated such dangers, are inconsistent and cannot be reconciled.

BARNES and VINJE, JJ., dissent.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action for personal injuries. The defendant was engaged in building an addition to the plant of the Power & Mining Machinery Company, at the village of Cudahy, under an independent contract. The plaintiff, a man forty-four years of age, who had worked at the carpenter trade for twenty-eight

years, was employed by defendant as such carpenter and joiner. On the 6th of July, 1910, plaintiff was directed by the defendant to receive, place, and lay in the third story of the building then under construction, beam joists for the support of the floor to be laid in such story. The longitudinal timbers for the support of such beam joists were in place for receiving them. These extended east and west, and the joists that were to be laid extended north and south. The space between the timbers upon which the joists were to be laid was about sixteen feet, and the joists were being placed or set in these timbers crosswise about four feet apart. The joists were about sixteen feet in length and about 8 x 12 inches thick. The plaintiff was standing on the north longitudinal timber receiving the joists to be set in place as they were hoisted from the ground. The hoisting was being done by the men below by means of a block and tackle attached to a so-called horse which rested on the joists that were already set in place. This horse device consisted of a plank twelve inches wide by three inches thick and about twenty feet long, set edgewise, with two legs consisting of 2 x 4 timbers fastened to the sides about eight feet from the front end, V shaped, and each resting upon a board, which lay flat on the joists and projected in front of the last joist laid and ran back parallel with each other to the tail end of the horse about twenty feet. There was a spread of three or four feet between the legs at their bottom. As the apparatus was being operated by the plaintiff and his helper, also a carpenter, when a joist was to be raised they placed the legs of the horse near the front ends of the two boards, a little forward of the last joist that had been placed. The tail end of the hoist, which was set edgewise and formed the back of the horse, was lashed to a joist by means of a rope, leaving the two boards on which the legs of the horse rested loose. One end of the rope which passed through the pulleys of the block and tackle was fastened to the joists

to be raised, and the men below, five or six in number, pulled at the other end of the rope, thereby raising the joist. Each joist weighed from 350 to 400 pounds. When it reached the proper level it was received by plaintiff and set in place. They would then untie the tail end of the horse, move the apparatus forward about four feet to the joist which had just been placed, and the same operation would be repeated. While one of the joists was being thus hoisted and the plaintiff was standing to the side on the north longitudinal timber waiting for the joist to come up, one of the loose boards on which the legs of the horse rested, by reason of the pressure exerted at the front end, tipped up at the rear and slued around, knocking the plaintiff off the timber on which he was standing, as the result of which he fell to the ground and sustained the injury for which this action was brought.

A special verdict was returned finding (1) that the hoist which was being used and operated at the time the plaintiff was injured was not safe, suitable, or proper and not so constructed, placed, and operated as to give proper protection to the life and limb of a person so employed or engaged as the plaintiff was at the time of the accident; (2) that the use of the hoist in that condition was the proximate cause of plaintiff's injury; (3) that the defendant in the exercise of ordinary care ought reasonably to have anticipated that said hoist was unsafe, unsuitable, or improper and not so constructed, placed, and operated as to give proper protection to the life and limb of a person employed or engaged as the plaintiff was at the time he was injured; (4) that the plaintiff at the time he was working with said hoist did not know and comprehend the danger from using said hoist in the condition in which it then was; (5) that the plaintiff in the exercise of ordinary care ought to have known and appreciated that unless the boards on which the legs of the hoist rested were securely fastened or held down at or near the rear end of said

hoist they were liable to tip up during the operation of hoisting as it was being carried on, and to cause some such accident as the one which happened to the plaintiff; (6) that the plaintiff in the exercise of ordinary care ought to have discovered and appreciated such danger before the accident; (7) that the defendant in the exercise of ordinary care ought to have notified and warned the plaintiff of the danger of operating the said hoist; unless the boards on which the legs of the hoist rested were securely fastened or held down at or near the rear end of said hoist, they were liable to tip up during the operation of hoisting as it was being carried on, and to cause some such accident as the one which happened to the plaintiff; (8) that such failure to warn the plaintiff was the proximate cause of his injury; (9) that no want of ordinary care on the part of the plaintiff contributed proximately to his injury; and (10) damages $6,500.

Defendant objected to the submission of question 7 on the ground that there were no issuable facts to make its submission proper, also to question number 1. After verdict, defendant moved for judgment, either on the verdict or on the evidence, and failing that, that question 7 be stricken out, the answer to question 8 changed from Yes to No and the answer to question 9 changed from No to Yes, and for judgment on the verdict as so changed. The plaintiff also moved for judgment upon the verdict, and failing that, moved that the answers to questions 5 and 6 be changed from Yes to No, and for judgment upon the verdict as so changed, and failing that, moved for a new trial on the ground of the verdict being inconsistent.

The court ordered the verdict set aside, granted a new trial, and denied all the other motions. From such order the defendant appealed.

For the appellant there were briefs by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *C. F. Fawsett.*

For the respondent there was a brief by *H. M. Sheets,* attorney, and *Jared Thompson* and *Herbert J. Piper,* of counsel, and oral argument by *Mr. Sheets.*

The following opinion was filed December 10, 1912:

VINJE, J. There is practically no dispute in the evidence as to how plaintiff was injured. The statement of facts shows precisely what happened and how it happened. The legs of a hoist, which was required to support a weight of from 350 to 400 pounds, in addition to a portion of its own weight, rested upon the ends of two one-inch horizontal boards in front of their support—the rear ends being unfastened. It is apparent that the fastening of the tail end of the plank of the hoist would have no tendency whatever to prevent the weight on the legs from tipping up the rear ends of the loose horizontal boards. That the natural and inevitable tendency of the weight on the legs was to lower the ends on which they rested and tip up the other ends is a fact of which every child using a teeter or see-saw is fully aware. That they would so tip up whenever the weight in front of the support overcame the weight to the rear thereof is equally obvious. That a weight of from 350 to 400 pounds, in addition to the weight of about two thirds of the hoist, though applied only a few inches in front of the support, was likely to overcome the weight of that portion of the boards lying back thereof, is also quite apparent. It is inconceivable that a carpenter of twenty-eight years' experience should not be cognizant of these facts. He knew just how the hoist was placed, how it was fastened, and what work it had to do. He knew also that any downward pressure or weight upon the legs would tend to raise the rear ends of the boards on which they were placed. In short, he knew everything the master could have told him relative not only to the manner in which the hoist was constructed and placed, but also to the effect of using it

in such manner as it was used. The mechanical appliance, operation, and resultant danger were so simple and obvious that comment thereon serves only to confuse. One who cannot appreciate such danger from a view or mental picture of the situation itself is not likely to do so through the medium of argument or explanation. Fully knowing and appreciating such situation, plaintiff must be held as a matter of law to have assumed the risk.

Sec. 1636—81, Stats., does not abolish the defense of assumption of risk or contributory negligence. *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179; *Williams v. J. G. Wagner Co.* 110 Wis. 456, 86 N. W. 157; *Knisley v. Pratt,* 148 N. Y. 372, 42 N. E. 986; *Caddy v. Interborough R. T. Co.* 195 N. Y. 415, 423, 88 N. E. 747; *Schmitt v. Rohn,* 110 N. Y. Supp. 1086; *O'Maley v. South Boston G. L. Co.* 158 Mass. 135, 32 N. E. 1119. This question is fully treated in the first case cited, and it is deemed unnecessary to say more here than merely to refer to it.

It follows logically from what has been said that no duty devolved upon the defendant, though found to exist in answer to question 7, to warn plaintiff of the danger. For somewhat analogous cases see *Dougherty v. West Superior I. & S. Co.* 88 Wis. 343, 60 N. W. 274; *Dahlke v. Ill. S. Co.* 100 Wis. 431, 76 N. W. 362; *Faber v. C. Reiss C. Co.* 124 Wis. 554, 102 N. W. 1049; *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350, 119 N. W. 289; *Ladwig v. Jefferson Ice Co.* 141 Wis. 191, 124 N. W. 407; *Brotzki v. Wis. G. Co.* 142 Wis. 380, 125 N. W. 916; *Brown v. Conners,* 149 Wis. 403, 135 N. W. 857.

That the answers to questions 5, 6, and 9 are not inconsistent is decided and clearly shown in the case of *Campshure v. Standard Mfg. Co.* 137 Wis. 155, 118 N. W. 633. Assumption of risk and absence of contributory negligence may co-exist. The former relates to the assumption by the plaint-

iff of a risk already in existence at the time it is assumed; the latter, to conduct on his part that increases an existing risk, or creates or contributes proximately to a new one.

The court should have changed the answer to question 7 from Yes to No, and, upon the verdict so changed, rendered judgment for defendant.

By the Court.—Order reversed, and cause remanded with directions to change the answer to question 7 from Yes to No, and, upon the verdict so changed, to render judgment for defendant.

The following opinion was filed December 12, 1912:

TIMLIN, J. This is an appeal from an order granting a new trial on the ground that the special verdict was inconsistent. There is no question, I think, but that the findings of the special verdict are inconsistent with one another, but the majority opinion disposes of the case on the merits and orders judgment for the defendant on the theory that the undisputed evidence shows assumption of risk.

I cannot assent to this disposition of the case, but think the order appealed from should be affirmed. The statement of facts in the majority opinion is correct and need not be here repeated except in one particular, and that is the point upon which the case turns.

The two "boards" mentioned in the majority opinion upon which the legs of the "horse" rested were planks three inches thick and twenty feet long and probably twelve inches wide. They projected eighteen or twenty inches east of the easterly joist, and the legs of the "horse" rested on them eight inches or a foot east of the east joist. (East is toward the high end of the "horse" to which the hoisting tackle was fastened; west, to the low end of the "horse" which was tied down to a joist with a rope.) When this is added it is not quite so obvious that these "boards" would tip up in hoisting a piece of

timber weighing 350 to 400 pounds. We must bear in mind that the burden of proof is upon the defendant, and omissions in the evidence count in favor of the plaintiff. The appliance had been in use several years, although it was new to the plaintiff. There is evidence that he handled and adjusted it as directed by the superintendent and that he had hoisted into place with it one joist with safety, but while hoisting the second one he was injured by one of these planks tilting up and swinging sidewise and striking him. Upon these facts and at common law no negligence of the defendant was shown, but defendant's negligence results from the statute, sec. 1636—81 (Supp. 1906: Laws of 1901, ch. 257). Now the assumption of risk is found on the foregoing facts by the majority opinion notwithstanding this burden of proof and notwithstanding the plaintiff testified he did not know of this danger and notwithstanding that no member of this court can now say without making experiment that 350 or 400 pounds, or rather one half of that weight, would tilt up a three-inch twenty-foot plank with a leverage of eight inches or a foot. It is not even shown of what timber these planks were, nor is there any estimate of their weight nor of the weight which would be required to uptilt the plank when applied eight inches or one foot from the fulcrum, seventeen and one-half feet of the plank projecting on the other side of this fulcrum. It is also noticeable that only one of the planks tilted up and swung around, and that there is affirmative evidence that the tilting and swinging of this was caused by the hoisting crew on the lower floor pulling sideways, thus making a case of an appliance condemned by statute with negligence of fellow-servants contributing to cause the injury. The defendant introduced this plaintiff to the appliance in question, which had been used by defendant for several years as a derrick or hoist. The defendant's superintendent states that he instructed the plaintiff in general language to fasten down the rear end of the contrivance. Plaintiff denies this

and claims he was instructed to fasten down with a rope the lower end of the so-called "horse." This it is admitted he did.

Mr. Justice KERWIN, I am authorized to say, concurs in this dissent.

Upon motion of the respondent a rehearing was granted on March 11, 1913, and the cause was again argued on May 3, 1913.

For the appellant there was a brief by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *C. F. Fawsett.*

For the respondent there was a brief by *H. M. Sheets, H. J. Piper,* and *Jared Thompson,* and oral argument by *Mr. Piper.*

The following opinion was filed May 31, 1913:

SIEBECKER, J. The plaintiff at the time of injury was working for the defendant as a carpenter and was assisting in the construction by defendant, as independent contractor, of an addition to the Power & Mining Machinery Company's plant at the village of Cudahy. Detailed statements of the facts of the case were made by the court, and in the opinion of the dissenting justices, when the case was determined on appeal by this court on December 10, 1912, to which we make reference to avoid unnecessary repetition (*ante,* p. 533, 138 N. W. 1016). Upon motion by the respondent a reargument of the case has been had, and upon re-examination of the questions presented we are satisfied that in our former conclusions the law was not correctly applied to the case and that the order of the circuit court granting a new trial must be affirmed. Upon the former consideration of the case the court was led to a conclusion which disposed of the case upon the merits, upon the ground that under the evidence it appeared, as a matter of law, that the plaintiff had assumed the risk of the hazard and for this reason he had established no cause of action.

Plaintiff rests his case on the rights and liabilities as defined by sec. 1636—81, Stats., which provides that:

"A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances, which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection, to the life and limb of a person so employed or engaged."

The history of this law has been fully set forth in *Koepp v. Nat. E. & S. Co.* 151 Wis. 302, 139 N. W. 179. That the hoist in question is one of the appliances specified in the statute cannot be questioned. It was held in the *Koepp Case* that the legislature intended to make employers absolutely liable as to the safety of employees in the situation embraced in the statute, except when the injured person assumed the risk or was guilty of contributory negligence. The court there adopted the declaration of the court in *Gombert v. McKay,* 201 N. Y. 27, 94 N. E. 186, as expressive of the legislative purpose, which was in substance that:

"It in terms absolutely forbids those employers to furnish or operate or cause to be furnished or operated any apparatus therein mentioned of the character and quality described by it. It, in its effect, provides that any employer who either personally, or by another, furnishes for the performance of any named labor a forbidden article, shall be responsible therefor."

In applying this law to the instant case it is of controlling importance to keep in mind that the defendant is forbidden to furnish a hoist which is unsafe, unsuitable, or improper and to so place and operate it as not to afford the employee proper protection to his life and limb. The question whether the hoist was suitable, safe, and proper, and whether it was so placed and operated as to give proper protection to the

employees engaged in the erection of the building, was negatived by the jury. The jury also found that plaintiff did not know and comprehend the danger of using the hoist in the condition it was, and that the plaintiff, in the exercise of ordinary care, ought to have discovered and appreciated the danger attending its use. This court, as above stated, upon the original hearing of the case considered that, upon the facts and circumstances shown by the evidence, it must be held, as a matter of law, that the plaintiff ought, in the exercise of ordinary care, to have known and appreciated such danger and hence he assumed the risk. There is evidence tending to show that the plaintiff followed the direction given him to tie the plank to which the hoisting tackle was attached to a joist with a rope and that he did this in the manner directed by defendant's superintendent, and that he placed the planks supporting the horse, holding the plank with tackle, as directed and as they had been placed to hoist the first joist, which was successfully accomplished. It also appears that the plaintiff had not operated this hoist before this morning and had only observed the operation of raising one joist, and that he had had no experience with a hoist like this one, though he had worked at hoists, used for this purpose, of different construction. He testified to the effect that he attempted to place the legs of the horse, supporting the hoist plank, near the joist on which the two planks supporting the horse lay, or a little ahead of it, but that he did not measure it; that he intended to place it a little forward—eight inches or a foot. He also states that he thought everything was all right so long as it worked right; that he did not understand it could tip over as it did, and that he did this work and set up the hoist and fastened it as directed. The horse was supported by three-inch twenty-foot planks. The weight of the joist to be raised was estimated at from 350 to 400 pounds. There is also evidence that the men at the rope below, doing the hoisting, pulled sideways instead of directly downward,

and that the accident was caused by the plank on the side toward which this pulling was done tilting up at the rear end, swinging around, striking the plaintiff, and knocking him off from the girder he stood on, causing him to fall to the bottom of the building. True, there is also evidence showing that the plaintiff knew how the apparatus was constructed and how it was being operated. This, however, does not indisputably establish the fact that the dangers incident to operating the hoist were so open and obvious that a reasonably prudent person, under the circumstances, ought to have appreciated and observed them. We are persuaded that the record presents a state of facts from which fair-minded men may honestly draw different conclusions, and that the question of the plaintiff's contributory negligence or his assumption of the risk, under the evidence, is of such uncertainty as to present questions for determination by the jury. This conclusion is supported by the trial court on its submission of these issues to the jury, because he concluded there was room in the evidence for conflicting inferences. Re-examination of the case has convinced us that the trial court's ruling on this question was right and that our former conclusion, holding that the record shows the plaintiff assumed the risk as a matter of law, is erroneous.

It is contended that the trial court erred in submitting to the jury the question whether or not defendant, in the exercise of ordinary care, ought to have warned the plaintiff of the unsafe conditions under which the hoist was being operated, upon the ground that the pleadings in the case presented no such issue. The court submitted this issue to the jury and they found against the defendant on the question, and also that such failure to warn was the proximate cause of the injury. It appears that the plaintiff's attorneys, after the evidence had all been received, requested that the complaint be amended to conform to the evidence in this respect. The court did not then specifically rule on the matter requested;

but stated that he would do so, and then proceeded to submit the issues as if the pleading were so amended, and subsequently treated the case as though the amendment were allowed. This course of procedure must be considered equivalent to allowing the amendment. It is considered that the question was properly included in the verdict. Upon this question (No. 7 of the verdict) the court instructed the jury that the employer "must warn him [plaintiff] of all dangers to which he will be exposed in the course of his employment, except those which the employee may be deemed to have foreseen as necessarily incident to his employment or which may be open and obvious to a person of his experience and understanding." By their answer the jury found it was the defendant's duty to give the plaintiff warning of the dangerous condition of operating the hoist as it did. By questions 5 and 6 of the verdict the jury found that the plaintiff, in the exercise of ordinary care, ought to have known and appreciated these dangers. The jury found that the hoist furnished by the defendant was not safe, as required by the statute, and that such unsafe condition proximately caused the injury. These facts render the defendant liable unless it be found that plaintiff either assumed the risk or was guilty of contributory negligence. The vital issues of fact, therefore, were whether or not the plaintiff had assumed the risk or had been guilty of contributory negligence. It is clear there is an irreconcilable conflict in the facts found by the jury in their findings under questions 5 and 6 and question 7, as pointed out by the court. If the danger was so open and obvious that plaintiff ought to have appreciated it, then, as the court instructed the jury, the defendant was under no obligation to warn the plaintiff. The trial court so held and for that reason properly awarded a new trial of the case.

By the Court.—The order appealed from is affirmed.

BARNES and VINJE, JJ., dissent.

TURNER, Appellant, vs. LEARMAN, Respondent.

April 12—May 31, 1913.

Alienation of wife's affections: Criminal conversation: Evidence: Question for jury.

In an action for alienation of a wife's affections and for criminal conversation, the direction of a verdict in defendant's favor was error, because different inferences could legitimately be drawn from the evidence and the jury would have been warranted in returning a verdict thereon for plaintiff.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

H. F. Morson, for the appellant.

For the respondent the cause was submitted on the brief of *Albert H. Krugmeier.*

BARNES, J. This action was brought by the plaintiff against the defendant to recover damages for alienation of his wife's affections and for criminal conversation. The court directed a verdict in defendant's favor, and from a judgment entered thereon the plaintiff appeals.

Direct proof of adultery is seldom obtainable. It must ordinarily be proven by circumstantial evidence. The jury might legitimately believe the evidence of the plaintiff and disbelieve that of the defendant, where there was a conflict. If different inferences could be legitimately drawn from the evidence, those most favorable to the plaintiff might be drawn. If the inference of guilt might properly be drawn from the whole evidence in the case, it presented a jury question. It is only where there is an entire lack of credible evidence that a court is warranted in taking a case from a jury. These propositions are elementary and authorities need not be cited to support them. The sole question in the case is whether on the evidence adduced the jury would be justified

in returning a verdict for the plaintiff, bearing in mind the rule that the ruling of the circuit court in directing a verdict will not be set aside unless clearly wrong.

Archie Turner, the ten-year-old son of the plaintiff, testified that the defendant stayed at his father's house during the hunting season of 1910; that during that time his mother went to the root house and defendant followed her in a short time and went inside and shut the door; that he (the witness) went to the root house and tried to get in and they told him to go to the house; that in a little while he tried again to get in and they would not let him in the second time; that they were in the root house a good half hour and that the door was locked. The plaintiff was away from home at the time. The episode is not denied by the defendant, but he makes a plausible, and it may well be a truthful, explanation of it. He says he was employed by plaintiff in the fall of 1910 and that he was directed by him to salt a deer and that this is what he was doing in the root house with plaintiff's wife. He also said that the door was not locked and that Mrs. Turner told Archie when he tried to get in to go to the house and mind the baby. There was a direct conflict in the testimony as to whether or not the door was locked, and the jury was at liberty to believe the boy if it saw fit. If it was locked, that circumstance might not be conclusive of the defendant's guilt, but it would require a good deal of explanation which a jury might be slow to take at its face value, even where the door had a spring lock.

The boy further testified that when his father was gone the defendant would get him and his sister, who was younger than he, to go out and gather leaves and would give them a cent a sack for them and that he did not do this when plaintiff was home. Also that when the father was gone defendant would be in the house a good deal with his mother, but it was otherwise when the father was home.

The plaintiff testified that prior to 1910 the defendant did

considerable hunting and trapping and stopped at plaintiff's house; that he employed defendant from January 10 to March 10, 1910, and that thereafter he hung around doing trapping and hunting until about Christmas; that Mrs. Turner left for New London to visit plaintiff's sister on December 22d for a stay of four days and did not come back until January 2d, at which time he went for her; that four days after his wife left the defendant also went away without saying where he was going; that he (plaintiff) found her at the home of defendant's father and mother and found the defendant there with her when he went to bring her home; that when he got there the defendant and his wife were in one room and the old folks were in another; that he told his wife he came to go home with her, and that she looked at defendant and said she did not know as she would go home at all; that he asked the defendant what he was tagging his wife around the country for, and he replied that that was no affair of plaintiff's; that he didn't have a shoestring tied to him and he had a right to go where he pleased; that his (plaintiff's) wife came home with him, but was determined that defendant should come also; that he (plaintiff) and his wife were in one rig and defendant in another as they drove to New London to catch the train and that she kept looking back continually and wanted to know if defendant was coming; that his wife requested him to see if defendant got on the train at New London, and when he did not she said she would return at once if he did not come on the next train; that on her homeward trip she said she would end their trouble when she got to a drug store; that when the train arrived at Antigo she insisted on their staying over to see if the defendant got on the train or not; that his wife insisted on his going to the train with her to meet defendant; that plaintiff and his wife then went to their home and defendant followed in a couple of days, when he was paid up and discharged; that he came to the house a couple of times afterward, but not on

plaintiff's invitation; that his wife did not seem to be the same after this; she would look out the way she saw defendant go, and cry; that when he asked her the reason, she would say: "You have raised h—l with *Will* [the defendant] and I don't care to live any more;" that Mrs. Turner left him in July, 1911, ostensibly to visit the plaintiff's sister, but instead went to the home of defendant's parents, near New London, and that at this time the defendant was in the vicinity of Kempster in Langlade county. On July 5th Mrs. Turner wrote a letter to a neighbor, Mrs. Vaughn, whose postoffice address was Kempster, in which she said, among other things:

"Did you see *Will* the day I left? Write back by return mail and let me know if he is at Kempster yet. You tell him there is somebody down here that wants him to come on the next train, and be *sure*. She told me to tell him, so you tell him for me. Say, Sadie, keep this letter out of sight of *Bert* and to yourself, because he gets madder than h—l when I write to any one. . . . Now answer right away and let me know about *Will*. His poor mother is so lonesome she cries for him. She says: If *Will* ain't at your place have Orves write to him or see him for her. Now, Sadie, keep still about this; the old man gave me h—l all the way to Antigo that day I left."

The inference might well be drawn from this letter that the "somebody" who was anxious to have "*Will*" take the next train was none other than the writer of the letter. Mrs. Vaughn showed the letter to the defendant the day she received it, and, while it may be a mere coincidence, he did leave on the next train and went to his father's home, where the plaintiff's wife was staying. He says he stayed but a short time, but he worked not far from there. The plaintiff further testified that in July he went to where his wife was staying to induce her to return, but that he did not succeed and he returned home the next day. He went to see her again in August and remained over night. He said his wife sent for the defendant and he came in the evening, and while he

was there she said, apparently addressing the defendant, "What will we do?" And in answer to her own question said, "We will stay and fight it." She again refused to return. At this time she had instituted an action for divorce. Defendant did not visit his parents in 1910 until Mrs. Turner went to their home, nor did he do so in 1911. Admittedly there was some correspondence between plaintiff's wife and the defendant. The plaintiff also testified that he found some postal cards in the pocket of a pair of trousers which defendant left at his place. There were some "mushy" verses printed thereon, but no satisfactory proof that Mrs. Turner sent or gave the cards to the defendant. Mrs. Turner was examined in reference to a second letter which she wrote to Mrs. Vaughn under date of July 24, 1911. It does not appear to be in the record, but it appears from the record that it contained the following statement: "God only knows which way he went and never expect to see him again." This referred to the defendant, and while he was not at his father's house where Mrs. Turner was staying when the letter was written, he was working in the immediate vicinity.

No one of these circumstances standing alone is very significant. This may be said generally in reference to the separate links in what may be a very satisfactory chain of circumstantial evidence. It may well be that the defendant is blameless. He may be the one pursued rather than the pursuer. If so, he did not try very hard to make his escape. Some of the evidence referred to is contradicted. Some of it is explained and some of it is difficult to explain. We do not care to comment on it at length or to emphasize any part of it. Inasmuch as a new trial must be had, comments might work prejudice. We do not point to any one item of evidence as making a case for the plaintiff. What we do hold is that the jury had the right to pass on the credibility of the evidence if conflicting inferences might reasonably be drawn therefrom, and that, taking the entire testimony offered, dif-

ferent inferences might be drawn and it was for the jury to draw the one which it deemed to be correct, and that it was fairly within its province to find the necessary facts to entitle the plaintiff to recover.

By the Court.—Judgment reversed, and cause remanded for a new trial.

SIEBECKER, KERWIN, and TIMLIN, JJ., dissent.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant, vs. INDUSTRIAL COMMISSION OF WISCONSIN and another, Respondents.

April 12—May 31, 1913.

Workmen's Compensation Act: Railway employees: Acceptance of act by company: Not limited to shop and office employees: Statutes: Construction.

1. As to all employees of a railway company—not merely as to those "working in shops and offices"—the company may accept the provisions of ch. 50, Laws of 1911 (secs. 2394—1 to 2394—31, Stats.). TIMLIN and KERWIN, JJ., dissent.
2. All the employees of a railway company were covered by its acceptance in general terms of the provisions of said act, although such acceptance was followed by specifications as to number of employees and places and nature of employment which related only to employees working in shops and offices.
3. The plain language of a statute cannot be rendered ambiguous by an erroneous popular conception of its intent.
4. Where a special committee of the legislature, appointed to investigate a subject, reported a bill which was divided into subjects by appropriate headings and was accompanied by explanatory notes both by the committee and by counsel who were employed to assist it, and the proposed legislation was enacted in the light of such headings and notes, they may be properly considered in determining whether there is any obscurity in the law calling for judicial construction.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

Action involving the question of whether railway employees, outside of those "working in shops or offices," are within the protection of ch. 50, Laws of 1911, commonly called the Workmen's Compensation Act, now secs. 2394—1 to 2394—31, inclusive, of the Statutes.

Torger Torvalson, an employee of the plaintiff and not working in a shop or office, while in the line of his duty, July 24, 1912, was accidentally killed. Prior thereto and in due course, the defendant elected to accept the provisions of ch. 50 aforesaid by filing with the *Industrial Commission* its election in this form:

"Take notice that the undersigned employer of labor in Wisconsin accepts the provisions of chapter 50, Laws of 1911, Wisconsin Statutes.

"Number of employees 1250—Number varies somewhat from time to time.

"Location of place of employment—Milwaukee, Fond du Lac, Stevens Point and other places.

"Nature of employment—Miscellaneous office work, shop work, repairing cars, etc.

"Dated at Milwaukee this 31st day of May, 1912."

The defendant, in addition to filing the election as stated, complied with all the conditions of the law essential to bring itself therein so far as it was competent to do so.

In due course, after the accident, *Ella Torvalson,* widow of the deceased and mother of three children by him, aged six, four, and two years, respectively, duly made claim for such compensation as she and her family were entitled to under the law. Thereupon, the question was raised as to whether the Compensation Act extended to railway employees, other than those "working in shops or offices." The decision was in the affirmative. Thereupon the railway company commenced this action in the circuit court for Dane

county to review the question so decided, resulting in the conclusion of the *Commission* being affirmed. This appeal is from the judgment.

For the appellant there was a brief by *W. A. Hayes,* attorney, and *John L. Erdall,* of counsel, and oral argument by *Mr. Hayes.*

For the *Industrial Commission* there was a brief by the *Attorney General* and *Byron H. Stebbins,* first assistant attorney general, and oral argument by *Mr. Stebbins.*

For the respondent *Torvalson* the cause was argued orally by *J. E. Thomas.*

A brief was also filed by *R. L. Clark,* attorney.

MARSHALL, J. The only question of any moment presented for decision is, whether it is competent for a railroad company to accept the provisions of the statute aforesaid, except as to its employees "working in shops or offices." It is appreciated that, at the time appellant filed its election, it was commonly thought that such competence did not exist. Though appellant's election was general in terms with special reference to employees working in shops or offices, doubtless, as its counsel frankly confesses was the fact, it intended to accept the Compensation Act to the fullest extent of its competency. The form used was furnished by the *Industrial Commission.* It used words of election, in general, to come under the act, as the law provides, followed by specifications as to the number of its employees, the kind of service, and where the labor was being performed. The additional features were mere matters of administration. They were not intended by the *Commission* nor by appellant to limit the words of acceptance. Moreover, the law makes no provision for any such limitation. Therefore, we have no hesitancy in affirming the decision of the circuit court, that all of appellant's employees were included in the election if the law authorized it. There is, really, no contest on this point; but,

if it were otherwise, there would hardly be room for reasonable doubt, that the *Commission* and the circuit court reached the correct conclusion. The question seems to be raised now merely for the purpose of having this court formally pass thereon.

Whether the Compensation Act extends to all railway employees, is of very great interest, because of the large number of persons affected, the hazardous nature of the employment, the manifest public policy to make such provisions for repairing the injuries to all employees so far as practicable, the evident justice of it, not as matter of charity but as matter of humanity and right both to the living and the dead, and as matter of wise public economy as well, to the end that the maimed in service and the surviving widows and orphans and other dependents of those whose service results in fatal injuries should have their losses reasonably dealt with as matter of general concern. No movement in any age has made more for the elimination of waste and the economical application of personal injury cost of production and distribution of those things which are necessary for or administer to legitimate human desires, where it belongs, and to where it must inevitably go as a final resting place, than laws of which the one in question is a distinguished type,—a crystallization, as has been said before, into legal obligation of moral duty and economic truth. The conception and appreciation thereof is such among the nations of the world that the countries which have no such system are exceptional, and consciousness of the justice and necessity therefor is confessed, in general, by all mankind where the dignity of labor has its merited significance.

In view of what has been said, that the greatest of our industries—the one for which such a law as the one in question is manifestly most needed, and it would seem most desired, by employer, employees, and the public—should be left out of the scope of its beneficent provisions, would challenge attention

as strange, "passing strange." In the circumstances we face, the inclination, if not the duty, would be to include the industry rather than to exclude it by construction, if the meaning of the law must be read out of obscurity. It would seem almost unbelievable that the legislature, in providing a system to lay the burdens of personal injury losses where they will be as soon as practicable absorbed into the products of industry, left out the most significant class, by far, of the objects of solicitude.

We must confess the idea has been prevalent that the Compensation Act was not intended to apply to railway employees, in general. That has come about, doubtless, from a sentiment which grew up while the act was under consideration in the legislature, based, largely, on a lay understanding of the classification of railway employees into those engaged in shops or offices and all others found in the first part of the act, and the indifference of, or opposition from, some of the employees as well as employers, before the special committee which prepared the bill and before other legislative committees. Somehow, but just how, no one seems to comprehend, the air, so to speak, became, during the progress of the act through the legislature, charged with the idea that there was some specialization as to railway employees and, that, supplemented with the fact of railway employers having kept aloof from the matter until appellant chose to raise the question, seems to have caused more or less of a conviction that the general class of railway employees were not within the benefits of the law.

Notwithstanding that, upon the first occasion of the question being presented to the *Commission* for decision over a year after the enactment took effect, a decision seems to have been readily reached that the law, as regards its compensation features, in letter and spirit, includes, and was intended to include, all railway employees, and the learned circuit court reached the same conclusion. It does not seem that either the *Commission* or the trial court considered that it was re-

quired to solve any ambiguity in reaching that conclusion. If that be right, it is not the first time a wrong idea, produced by the atmosphere characterizing an enactment, and the harmony therewith for a long period of time, have taken hold of the public mind so as to produce quite a settled conclusion as to legislative intent, and the creation of a condition, which, after careful search when such was required, was not found, in fact, to be either in the letter or spirit or intent of the enactment; a significant instance being the conception of the primary election law, that it rendered unlawful the holding of a political party delegate convention as a step in placing a choice of candidates on the primary ballot.

We have been constrained to remark as above, to show that we have not been unmindful of the general idea which has prevailed as to the scope of the Compensation Act. It is proper, in fact it seems a duty, to take notice of that, so far as we might otherwise be led to a too hasty conclusion as to the meaning of the law, looking only at its seemingly plain words in the light of the hope which was vitalized in its enactment and which grows with experience. The sentiments characterizing a law might have some influence to create obscurity, where otherwise it would not exist, but if after all, we find, as the circuit judge and the *Commission* did, the words of the act plain and the legislative purpose manifest, a contrary conception of it, however produced, cannot legitimately be permitted to create an obscurity to be cleared up by construction, influenced by the history of the legislative labors which constructed the law. A law, plain in its letter, may be obscure when applied to the subject with which it deals. The result may be absurd, or so harsh or unreasonable, as to produce conviction that the literal meaning is not the real purpose. But plain legislative language cannot well be rendered ambiguous by applying to it the mere direction given to public thought by events characterizing the enactment.

The bill, as it was reported to the legislature by its special committee after nearly two years of investigation and study, aided by all the legal assistance in framing it which it desired to employ, contained an exception of considerable significance in the third section as will be hereafter seen. That furnished all the basis for the idea that the law was not intended to include railway employees, generally, which can be found therein. The committee divided the proposed legislation into subjects by appropriate headnotes. The report was adopted by the legislature, after long consideration in both houses and by committees, without any change as regards the matter under consideration.

Since the bill was so considered and passed in the light of the committee's division into subjects and, further, by an exposition of its provisions both by the committee and the eminent counsel who assisted, the explanatory part by the committee is, to all intents and purposes, incorporated into the enactment, or at least may be kept in view in determining whether there is any obscurity therein, rendering judicial construction necessary, or even permissible, and the accompanying notes by counsel may also properly be considered.

Save the exception referred to, which we will incorporate in place for the better understanding of the law, the following is a copy of the bill as passed and now found in the statutes, including the designated subjects as made by the committee and preserved in the statutes.

Abrogation of defenses.

"Section 2394—1. In any action to recover damages for a personal injury sustained within this state by an employee while engaged in the line of his duty as such, or for death resulting from personal injury so sustained, in which recovery is sought upon the ground of want of ordinary care of the employer, or of any officer, agent, or servant of the employer, it shall not be a defense:

"(1) That the employee either expressly or impliedly assumed the risk of the hazard complained of.

"(2) When such employer has at the time of the accident in a common employment four or more employees, that the injury or death was caused in whole or in part by the want of ordinary care of a fellow-servant.

"Any employer who has elected to pay compensation as hereinafter provided shall not be subject to the provisions of this section 2394—1."

Application to railroads.

"Section 2394—3. Except as regards employees working in shops or offices of a railroad company, who are within the provisions of subsection 9 of section 1816 of the statutes, the term 'employer' as used in sections 2394—1 and 2394—2, shall not include any railroad company as defined in subsection 7 of said section 1816, said section 1816 being continued in force unaffected, except as aforesaid, by sections 2394—1 and 2394—2."

(*Excepted and continued sections.*)

"Section 1816. Every railroad company shall be liable for damages for all injuries whether resulting in death or not, sustained by any of its employees, subject to the provisions hereinafter contained, regarding contributory negligence on the part of the injured employee:

"(1) When such injury is caused by a defect in any locomotive, engine, car, rail, track, roadbed, machinery or appliance used by its employees in and about the business of their employment.

"(2) When such injury shall have been sustained by any officer, agent, servant or employee of such company, while engaged in the line of his duty as such and which such injury shall have been caused in whole or in greater part by the negligence of any other officer, agent, servant or employee of such company, in the discharge of, or by reason of failure to discharge his duty as such."

[Subdivisions 3, 4, 5, 6, 7, and 8 deal with matters of practice, administration, construction, and conflict of laws.]

"(9) The provisions of this section shall not apply to employees working in shops or offices."

Liability for compensation.

"Section 2394—4. Liability for the compensation hereafter provided for, in lieu of any other liability whatsoever,

shall exist against an employer for any personal injury accidentally sustained by his employee, and for his death, if the injury shall proximately cause death, in those cases where the following conditions of compensation concur:

"(1) Where, at the time of the accident, both the employer and employee are subject to the provisions of sections 2394—1 to 2394—31, inclusive, according to the succeeding sections hereof.

"(2) Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment.

"(3) Where the injury is proximately caused by accident, and is not so caused by wilful misconduct.

"And where such conditions of compensation exist for any personal injury or death, the right to the recovery of such compensation pursuant to the provisions of sections 2394—1 to 2394—31, inclusive, shall be the exclusive remedy against the employer for such injury or death; in all other cases the liability of the employer shall be the same as if this and the succeeding sections of sections 2394—1 to 2394—31, inclusive, had not been passed, but shall be subject to the provisions of sections 2394—1 to 2394—31, inclusive."

To the last section the committee appended, among other things, the following: "This section defines the two classes of employees to which sections 2394—4 and the subsequent sections apply."

Employer defined.

Section 2394—5. This section is in general terms and includes employers without exception, subject, however, to acceptance of the provisions of sections 2394—1 to 2394—31, inclusive.

Election by employer.

Section 2394—6. This is in general terms prescribing the manner of acceptance by employers of the provisions of sections 2394—1 to 2394—31, inclusive.

Election by employee.

Section 2394—8. This is in general terms in harmony with the preceding section prescribing the manner of employ-

ees being bound by the provisions of sections 2394—1 to 2394—31, inclusive.

The section preceding the foregoing defines employees in general terms, dividing them into two classes: 1st. Those working for public corporations; and 2d. Every person in the service of another under any contract of hire, express or implied, oral or written, . . . but not including any person whose employment is but casual or is not in the usual course of the trade, business, profession, or occupation of his employer.

To sec. 2394—7 and sec. 2394—8, covering the subject of employees and the manner of their becoming subject to the provisions of secs. 2394—1 to 2394—31, inclusive, the committee subjoined this explanation:

"These two sections define the two classes of employees to whom section 2394—4 and the subsequent sections apply. . . . All employees are within the provisions of section 2394—4 and subsequent sections of this act, unless at the (time) of entering into such employment the employee gives the employer written notice that he elects not to be subject to the provisions of the act."

The committee further adopted this explanation by counsel:

"The proposed bill may be generally divided into two parts:

"*Part 1.* Embraces the first three sections and relates to the so-called fellow-servant and assumption-of-risk defenses.

"*Part 2.* Comprises the remaining sections of the act and embraces what may be called its compensation provisions.

"Part 1 . . . operates to take away the fellow-servant and assumption-of-risk defenses as to all employers except only those who are included within the provisions of chapter 254, Laws of 1907 (sec. 1816, Stats.), being the railroad fellow-servant and contributory negligence law. Shop and office employees are included within provisions of the proposed act because the railroad act exempts them from the operation of that act. . . . The present act thus accepts the classification made by the railroad act and includes within it the entire class not subject to the railroad act. The classification made by the railroad act having been sustained by the supreme

court, it would appear to follow that the class not embraced within that act may properly be the subject of the proposed act. . . . The proposed act leaves the defense of contributory negligence intact, except as to those who elect to come within the compensation provisions. As to employers and employees who elect to come within the compensation provisions of the act, the provisions of Part 1 become immaterial, the compensation provided for being payable irrespective of negligence.

"Part 2. . . . Section 2394—4 may well be designated as the *keystone* of Part 2 or the compensation provisions of the act."

The subsequent sections of the act contain substantially only administrative features.

The foregoing picture seems to tell its own plain story, leaving no additional explanation necessary to show the legislative intent. The legislation was constructed, as the committee declared, through its counsel, in two parts, one dealing with common-law defenses and the other with the subject of compensation under a new system. The two parts are as separate as if they were embodied in separate enactments. Probably if such had been the case there would not have been a suspicion that what is designated as Part 2, headed by the words "Liability for Compensation," and introduced by sec. 2394—4 "as the keystone of it," was limited in any way by anything contained in secs. 2394—1, 2394—2, and 2394—3.

The subject treated by the latter is entirely concluded thereby and the subsequent section as a keystone introduces an independent subject. The last section of Part 1 closed with the words "said section 1816" as now existing "being continued in force unaffected, except as aforesaid, *by the preceding sections of this act.*" That is plain. We propose to leave sec. 1816, modifying the common-law defenses as to the particular situations mentioned in that section as to railway employees other than those "working in shops or offices,"

without change, but to abolish specified of such defenses entirely as to the class there excepted, so that, in case of a railway company not accepting the *"provisions of this act,"* it may enjoy the benefit of the common-law defenses in negligence actions as modified in sec. 1816 in the particular situations and as to the general class of employees there dealt with; but shall not have the benefit of specified of such defenses at all as to employees "working in shops or offices." The section closing Part 1 dealt with "the preceding sections of this act," while the following "keystone" section of the next subject dealt with "the succeeding sections of this act," leaving all included within the "keystone" section who shall not accept the compensation scheme "subject to the preceding sections of this act."

Thus Part 1 (secs. 2394—1 to 2394—3) dealt with the common-law defenses of "assumption of the risk and want of ordinary care of a fellow-servant" and as regards railroad employees continued the classification in sec. 1816, preserving to those engaged in the more hazardous feature of such industry some protection against the former common-law defenses and placing the railroad employees not favored at all by the existing statute with the general mass of employees to whom were secured entire immunity from two of such defenses.

The upshot of the situation is this: Under sec. 1816, railway employees in the nonhazardous field of railroad work, were treated as not entitled to any special legislative protection, whereas, under the new scheme embodied in Part 1 of the Compensation Act, they were made the most favored class.

We see method in that when we turn to Part 2 of the act because of its having been left optional with railway corporations, as with all other private employers, whether to come in under it or stay out. To come in might be attended with some pecuniary loss as to its employees in the specially haz-

ardous features of the industry, with compensating advantages as regards its employees "working in shops or offices." Without the latter there was less inducement to encounter the peril of the former.

Manifestly the legislature would not have created a system which would, necessarily, have left irretrievably, the railway employees which were specially favored by sec. 1816 in a worse position than those not favored there at all. The law-making body in dealing with the next subject created competency of the employer to retrieve the less favored of their employees in Part 1 from their position by coming in under Part 2 and thus removed all distinctions not only between their employers but between them and employees in general.

What has been said seems very plain. Not only does the "keystone" section deal with the subject of compensation of injuries to the employee from an original standpoint, but does so in general terms in literal sense applying to all employees, pointing forward for all details and administrative features to the "succeeding sections of this act."

None of such succeeding sections contain in literal sense or inferential suggestion any exception. The term "employee" in sec. 2394—5 was defined in the broadest terms. There is no room to read into it any exception as to class. The provisions for accepting the act in sec. 2394—6, the definition of "employer" in sec. 2394—7, and all other facts referable back to the "keystone" section, are in harmony therewith. The note of the committee under sec. 2394—8 is to the effect that it and the preceding sections include all employees, subject to the election feature, to whom sec. 2394—4 (the keystone section) and the subsequent sections apply; and that all employees are within the provisions of sec. 2394—4. The committee in that followed the exposition of the bill by its legal adviser, and as the fact stands out quite plainly we think, that as to employees who come under the

act, regardless of the nature of the employment, "the provisions of Part 1 of the act become immaterial,"—there is as to them, no classification respecting the defenses mentioned in sec. 1816 or in sec. 2394—1, "the compensation provided being payable irrespective of negligence on the part of either employer or employee."

An event occurred during the closing scenes of considering the proposed Compensation Act by the legislature, to which our attention was called by counsel for respondents and has been investigated, which seems to declare plainer, even than could be done by words, if that were possible, that the purpose of Part 2 of the Compensation Act was not intended to leave any class of railroad employees out of its beneficent provisions.

After the bill as first offered had been perfected in the senate by the adoption of numerous amendments not affecting the question under discussion, it was passed by that body and sent to the assembly, where it was received April 6, 1911, it having been pending some four months upon the report of the joint committee which, with the aid of counsel, had spent the long period before mentioned in its preparation. April 12th after the bill was received as aforesaid it was referred with several assembly amendments to the committee on workmen's compensation. If the subject of whether railway employees, in general, should have the benefit of the new system then came up, there is no record, but if there had been any thought in the legislative mind to except any portion of them and that the bill at the then stage was obscure in respect thereto, now was the time to clear up the uncertainty. If there were any sentiment in favor of excepting railway employees, or any class of them, from the benefits of the new system, now was the time to challenge the judgment of the legislature upon it, because the final preparation was now being made to place the bill upon final passage. If the matter was ever men-

tioned in committee, no amendment was offered there or proposed by the committee.

Upon the bill coming up in the assembly on the report of the committee for the third reading the following amendment was offered:

"Amend by inserting after line 4, section 2394—32, a new section to read: Section 2394—33. The provisions of this act shall not be interpreted, or construed, so as to extend to or include under the provisions of this act, the following classes of railroad men, to wit: engineers, firemen, conductors, brakemen, section men and line men."

It was rejected and so emphatically that no record of the vote, in detail, was preserved. Thus it seems the legislature deliberately, in effect, affirmatively declared that there should be no specialization as to railway employees under the compensation part of the new system.

From the foregoing it is considered that the *Industrial Commission* and the circuit court were right in holding that the Compensation Act, without any sufficient degree of uncertainty about it to warrant any search for solution by rules for judicial construction, affords railway companies competency to come under it, placing all their employees on the same favored plane as other employees in industrial pursuits.

By the Court.—The judgment is affirmed.

TIMLIN, J. (*dissenting*). This important case comes before us upon an appeal by the railroad company from a judgment of the circuit court affirming an order of the *Industrial Commission* holding that as to all employees of the railroad company, in whatever branch of the railroad service engaged, the company may accept the provisions of ch. 50 of the Laws of 1911 as amended by ch. 664 of the Laws of 1911, and so bring all such employees within the purview of these statutes. The appellant files a perfunctory kind of brief and argument in which it is said that it has no fault to find with the deci-

sion it appeals from. The respondents are represented by the attorney general, who introduces his brief with the statement that the appellant seems to invite affirmance, but that notwithstanding he appears on the record for respondents and so seeks affirmance, he deems it his duty to aid the court by presenting "several arguments against affirmance . . . which have not been urged by appellant." After the case was decided but before decision announced, Mr. R. L. Clark, an attorney and a member of the legislature which enacted the statute in question and of the legislative committee having the bill in charge, offered a brief in behalf of an unnamed client stating he understood the railway company could elect to come under the act as to shop and office employees only, and making the further point that in the instant case only the latter election was made, and hence that employees in the train service could or might be misled thereby and therefore omit to exercise their right of dissent given them by sec. 8 of the act in question.

The facts presented show that Torger Torvalson, husband of the respondent *Ella,* was at the time of his death on July 24, 1912, in the employment of appellant coaling engines and attending switch lights, and was neither a shop nor an office employee. On June 1, 1912, appellant filed with the *Industrial Commission* a paper signed by it declaring that it accepted the provisions of ch. 50 of the Laws of 1911; that the number of its employees was about 1,250, the location of place of employment was at Milwaukee, Fond du Lac, Stevens Point, and elsewhere; and that the nature of the employment was "miscellaneous office work, shop work, repairing cars," etc. I think it manifest from this document that neither the railroad company's counsel nor the *Industrial Commission* understood at the time of filing that the statute in question covered railroad employees in the train service. The general understanding up to this time was that employees in the train service were not affected by the provisions of the act in ques-

tion. An attempt to amend this act so as to include such employees is now pending before the legislature and such amendment has been advocated by eminent counsel for the railroad companies before the assembly committee on labor. This bill is known as No. 588A.

The system of numbering sections of the statutes in this state is very confusing and makes interpretation more difficult by its prolixity and awkwardness of expression. The statute purports to be sec. 2394, divided into thirty-one parts or sections indicated by the numbers 1 to 31 inclusive preceded by a dash or minus sign, and some of these sections are divided into numbered paragraphs called subsections. I shall refer to the sections as such by the number following the dash and to the subsections as such by number.

Secs. 1 and 2 of the act in question take away from all employers the defense of assumption of risk and from employers having four or more employees the so-called fellow-servant defense, and then declare that an employer who has elected to pay compensation as thereinafter provided shall not be so disabled. This is followed by a provision that no contract, rule, or regulation shall exempt the employer from any of the provisions of the first section, taking away these defenses in actions for personal injury. Sec. 3 provides that except as to shop and office employees the term "employer" as used in secs. 1 and 2 shall not include a railroad company. This section also provides that sec. 1816 of the Statutes as amended is continued in force unaffected except as to shop and office employees by secs. 1 and 2. Sec. 4 contains that part of the act in question which imposes liability for compensation under the act and displaces or removes all other common-law or statutory liability of the employer for personal injury sustained by the employee while in his service. This liability to compensation, and this immunity from any other form of liability only exists "in those cases where the following conditions of compensation concur." Observe that to bring a case within this

section not one but all of the conditions mentioned must concur. What are these conditions? By sub. 1 of sec. 4 it was provided in the original act as follows:

"Where at the time of the accident both the employer and employee are subject to the provisions of this act according to the succeeding sections hereof."

This was amended at the same session by ch. 664, substituting for the words "of this act" the words "of sections 2394—1 to 2394—31 inclusive," so that the paragraph reads:

"Where at the time of the accident both the employer and employee are subject to the provisions of sections 2394—1 to 2394—31 inclusive according to the succeeding sections hereof."

Where this is not the case, of course the Compensation Act does not apply. The only succeeding sections bearing at all upon this point are secs. 5, 6, 7, and 8. Sec. 5 declares who shall be considered employers subject to the provisions of this act within the meaning of sec. 4, and this includes railroad companies. Sec. 6 provides that the employer may elect to bring himself within the provisions of the act by filing with the *Commission* a written statement to the effect that he accepts the provisions of the act. The filing of such statement brings the employer within the purview of sub. 1 of sec. 4 no doubt. There is a reason for this, because as to shop and office employees a railroad company had the right to accept the provisions of the act. But it is not alone enough, as we have seen, that the employer be subject to the provisions of the act—the employee must also be so subject. Sec. 7 defines who shall be considered employees, and standing alone is broad enough to include all employees of every railroad company by the second subsection of this section; but sec. 7 does not stand alone. By sec. 8 it is provided:

"Any employee as defined in subsection 2 of the preceding section shall be deemed to have accepted and shall, within the

meaning of section 2394—4 of this act, be subject to the provisions of this act and of any act amendatory thereof, if at the time of the accident upon which liability is claimed:

"(1) The employer charged with such liability is subject to the provisions of this act."

Observe here it is not "subject to the provisions of this act according to the succeeding sections hereof," as stated in sub. 1 of sec. 4, but, subject to all the provisions of this act. This must include the provisions of secs. 1, 2, and 3. Otherwise the employer could not be said to be "subject to the provisions of this act." But the railroad company, except as to shop and office employees, is expressly not subject to the provisions of secs. 1, 2, and 3, consequently not subject to the provisions of this act as to men in the train service. This sub. 1 of sec. 8 was amended at the same session by ch. 664 of the Laws of 1911 so as to read as follows:

"if at the time of the accident upon which liability is claimed: (1) The employer charged with such liability is subject to the provisions of sections 2394—1 to 2394—31 inclusive."

This amendment did not change the meaning of ch. 50 as originally written and enacted, but it makes the meaning clearer if possible, because it substitutes for the words "this act," which by fair construction should include the whole act, the more definite and exact expression, "sections 2394—1 to 2394—31 inclusive." And in any event the law governing this case is the amended law.

Now it cannot be gainsaid that a railroad company as employer is not, with reference to men in the train service, subject to the provisions of sec. 2394—1 or sec. 2394—2. Sec. 3 expressly excepts such employer as to such employees. How then can it be said that the employer charged with such liability is "subject to the provisions of sections 2394—1 to 2394—31 inclusive"? If it is not so subject, then, recurring to sub. 1 of sec. 4, "at the time of the accident both

the employer and employee are (not) subject to the provisions of this act according to the succeeding sections hereof." The question may be summarized as follows: The act is in effect only in cases where both employer and employee are subject to the provisions of the act according to the sections thereof succeeding sec. 4. By one of the sections succeeding sec. 4 employees are not within the Compensation Act unless the employer is subject to all the provisions of the act. Railroad companies (except as to shop and office employees) are not subject to all the provisions of the act. Hence, etc.

Upon a fair construction of the act, therefore, it does not include railroad companies except as regards their shop and office employees.

But there are other considerations fortifying this view. It has long been the law of this state that:

"Whenever two acts of the legislature are susceptible of a construction which will render both operative, without doing violence to either, the court will, if possible, give them such a construction. It is only when the nature of the provisions, or the words used, are such as to render it impossible to reconcile them, that the court will apply the doctrine of repeal by implication. The rule of construction is that if there be two affirmative statutes, or two affirmative sections of the same statute, upon the same subject, the one does not repeal the other if they both consist together; and such a construction will be sought as will reconcile them." *Att'y Gen. ex rel. Taylor v. Brown,* 1 Wis. 513.

Now ch. 50 of the Laws of 1911 is wholly based upon mutual consent of the employer and employee to be bound thereby. The consent of the employer must be expressed in writing filed with the commissioners; that of the employee is implied from his acceptance of or continuance in the service of such employer. Sec. 3 of the act expressly provides that sec. 1816 and amendatory acts are continued in force unaffected except as to shop and office employees by secs. 1 and 2 of the act.

Sub. 6 of sec. 1816 provides: "No contract or receipt between any employee and a railroad company, no rule or regulation promulgated or adopted by such company, and no contract, rule or regulation in regard to any notice to be given by such employee shall exempt such corporation from the full liability imposed by this section."

Under *Att'y Gen. ex rel. Taylor v. Brown, supra,* is it impossible to reconcile ch. 50, Laws of 1911, with sec. 1816 of the Statutes? I think it is not only not impossible but there is no conflict between them. The "succeeding sections" referred to in sub. 1 of sec. 4 of said ch. 50 include sub. 1 of sec. 8 of the same chapter, and it is only the employee of an employer, in cases where the latter is subject to all the provisions of ch. 50, including secs. 1 and 2, that is bound by the implied contract of sec. 8 of ch. 50. All others are disabled from assent to the Compensation Act by sub. 6 of sec. 1816 quoted above, and unrepealed either expressly or by implication.

I do not think the point made, that by reason of the form of the statement filed by the appellant with the *Commission* train employees may be misled into waiver of giving notice in writing that they elect not to be subject to the provisions of the act, arises in the instant case, because the respondent *Ella Torvalson* is seeking to enforce the provisions of the act against the appellant. But it is something which might well be considered in the construction of the act and in the sufficiency of the filed statement in case where an injured employee seeks to recover under sec. 1816. The construction given to this act in the majority opinion is, I think, indefensible when we look into the act closely, and I fear it will finally result in the modification or total overthrow of the compensation law in this state.

I am of opinion, therefore, that because Torvalson was not a shop or office employee of the appellant there was in this case no right of recovery under ch. 50, *supra,* but the right

of recovery, if any, was under sec. 1816, *supra;* hence that the judgment of the circuit court and order of the *Industrial Commission* should be reversed upon this appeal.

I am authorized to say that Mr. Justice KERWIN concurs in this dissent.

QUINN, Plaintiff in error, vs. THE STATE, Defendant in error.

April 12—May 31, 1913.

Assault with intent to commit rape: Evidence: Intoxication rendering female incapable of consenting: Knowledge of such condition: Giving of liquor to produce it: Intent: Instructions to jury: Absence of outcry: Circumstantial evidence.

1. Evidence *held* sufficient to sustain a conviction of assault with intent to commit rape upon a female who was so intoxicated as to be insensible and incapable of consenting.
2. In such a case the act must be treated as being against her will.
3. The crime charged against defendant was an assault with intent to commit rape and the court instructed the jury that they should find him guilty if convinced beyond a reasonable doubt that he actually had sexual intercourse with the female at the time and place alleged and that she was at such time so intoxicated as to be incapable of either resisting or consenting to such act, or if they were so convinced that at the time in question the female was so intoxicated as to be incapable of either resistance or consent and the defendant, with knowledge of that fact, laid hands upon her with the intent then and there to have sexual intercourse with her. *Held* that, the attention of the jury being specifically directed to the necessity of finding that defendant had knowledge of her condition, there was no prejudicial error in failing to bring that to their attention in the first part of the instruction; especially as the evidence showed that in fact he must have known of the actual condition as to her intoxication brought about through his own acts.
4. The giving of intoxicating liquor to a female constitutes an assault with intent to commit rape if given with the intent to

destroy her power of resistance by reducing her to insensibility, and with the present intent to have sexual intercourse with her when in that condition.

5. Where it was shown that at the time of the assault the female was insensible and in a stupor, there was no error in refusing a requested instruction as to the effect of the absence of any outcry on her part.

6. Refusal to give requested instructions as to circumstantial evidence was not prejudicial error where the evidence in the case was largely direct and positive and there was no need for the jury to resolve any issue upon circumstantial evidence alone.

ERROR to review a judgment of the county court of Walworth county: CHARLES B. ROGERS, Judge. *Affirmed.*

The plaintiff in error prosecutes a writ of error to review a judgment sentencing him to confinement in the state reformatory at Green Bay for the crime of assault with the intent to commit rape upon one Agnes Secquist.

The crime is alleged to have been committed on the 22d day of February, 1912, in the city of Whitewater. Agnes Secquist was eighteen years of age in June, 1911. She had resided at La Crosse with her father up to August, 1909, when she had been committed to the Industrial School for Girls at Milwaukee, where she remained until September, 1911, at which time she was paroled and put into the home of Ralph Tratt, a farmer residing near the city of Whitewater. It is shown that she had led a wayward life and was insubordinate to parental control and therefore had been committed to the industrial school. She was informed that she was paroled upon condition of good behavior and that she must refrain from communicating and associating with men. It appears that she violated this condition and that she soon began to call up men and boys by phone, secretly, and planned to have them call for and meet her. She learned of the defendant by telephone communication under the name of Frank Johnson in January, 1912, and thereafter they repeatedly communicated by telephoning. They first met on Sun-

day, February 18th, on the city streets, pursuant to a telephone call by her at the saloon of one Kraft, where she had been in the habit of calling him. After meeting him they made an unsuccessful attempt to go to this saloon to secure something to drink, and, after spending some time on the street, they upon parting exchanged kisses in the street and she went home.

On February 22d she called defendant on the phone at Kraft's saloon and arranged with him to meet him near the home where she was staying. After having put the children to bed she and the hired man of Mr. Tratt went to meet the defendant at the place suggested. They saw the defendant and Hughes coming along the middle of the street. The hired man then went home and she went to meet the two men. When they met she put her arm about *Quinn* and kissed him. *Quinn* introduced Hughes to her as George Miller. She knew that this man introduced to her as Miller was not one Carlson, whom she had requested the defendant to bring with him. She and *Hughes* saluted by kissing and the defendant then produced a bottle and asked her to drink, which she declined, stating that she had already had two drinks of Canadian rye and some Miller's High Life, but in fact she had drunk neither and did not know what Canadian rye was. She took a drink from the bottle, filling her mouth, and then swallowing it. It was strong and she could hardly swallow it. She then returned the bottle to the defendant, who gave it to Hughes, who took a drink, and the defendant then took a drink and put the bottle in his pocket. They walked eastward toward town. She calculated to walk as far as Hall's, where Mr. and Mrs. Tratt were. They stopped at times on their way and drank. When they reached the normal school they stopped and drank and embraced and kissed. Then she thought that she saw some persons coming and feared that they would recognize her and suggested that they turn

north on Graham street. She remembered nothing of any drinking on this street and of no insult to her by either of the men. They then left Graham street, crossed Main street to Hall's residence, and saw Mrs. Tratt through a window, and from there they went to Center street, where she offered to go home, and the defendant suggested and started ahead to get some more whisky, and she and Hughes followed him to a large building where there was a light on the street corner. She feared that they would be seen by others and she and Hughes walked to the middle of the block on the side street, where they stopped and Hughes embraced and kissed her, proposing that she treat him right, and she declined to do so, understanding full well what he meant. When *Quinn* returned he whistled and came across the street and they then walked down Center street homeward. They drank at the Esterly school house, from the fresh bottle which *Quinn* had procured, until it was empty. She drank freely and as much or more than the men. While at this school they embraced and kissed, but neither of the men made an indecent proposal there. The last she remembers at this point was that she suggested going home and that she could not walk. They crossed the Esterly school yard to the side street leading to the normal school. She remembers they were carrying her, but does not remember walking on the walk. At the normal school her impressions were vague, but she had an impression of passing a large building with lights in it and that she fell down and was carried, and recalls being in bed in a strange place and of seeing Dr. Miller, whom she had seen at Tratt's home. She testifies to having no recollection of having or of any one attempting to have sexual intercourse with her.

The defendant *Quinn* was then twenty-five years old, living with and supporting his mother at Whitewater, and had been a factory worker for three years immediately preceding this day. The evidence discloses that he was a liquor drinker. Hughes was twenty-six years old and had been mar-

ried for two years. He and his wife were living with her mother. Hughes was arrested and jointly informed against with the defendant, but demanded a separate trial, which was awarded him. The men's version of the transactions of the evening after meeting Agnes Secquist, as to their walking on the streets, drinking of liquor, and the conversation they had, are in substantial accord except as to what occurred between Hughes and Agnes Secquist when *Quinn* left them on the Esterly school grounds while he procured the second bottle of liquor and returned thereto, and as to what occurred between her and defendant when Hughes first left them on the normal school grounds and returned; at which time Hughes testifies he observed them as he approached and saw defendant on top of her, in the position of having sexual intercourse with her, and that after defendant arose he saw her lying on her back, her legs stretched out, and her garments raised up to her waist; that she was in a condition of stupor and unconsciousness; that she made no effort to put her clothes down to cover the exposed parts of her person, and that he, after the defendant spoke suggesting to him to help himself, pulled up one of her stockings which had come down, and she said "Stop that," and that he then pulled her clothes down to cover her, and to him she appeared unconscious and as if she knew nothing. It appears that she could not walk nor give intelligible replies to inquiries when found by others immediately after she was left by the defendant and Hughes; and that she was in a maudlin stupor, the result of alcoholic liquors.

The defendant denies that he had or attempted to have intercourse with her at any time on the occasion in question and denies that he was in the position on her as testified by Hughes or that he did or said anything tending to show he was guilty of outraging her as is alleged and claimed by the state.

The jury found that defendant assaulted her with intent

to commit the crime of rape, and upon this verdict the court adjudged the defendant guilty of this crime and sentenced him to two years' confinement in the state reformatory. This judgment is before us for review.

For the plaintiff in error there was a brief by *E. T. Cass* and *Henry Lockney*, attorneys, and *D. S. Tullar*, of counsel, and oral argument by *Mr. Cass* and *Mr. Lockney*.

For the defendant in error there was a brief by the *Attorney General*, *W. W. Gilman*, assistant attorney general, *Robert C. Bulkley*, district attorney, and *Jay W. Page*, and oral argument by *Mr. Gilman*, *Mr. Bulkley*, and *Mr. Page*.

SIEBECKER, J. The defendant contends that the evidence fails to establish the fact of his guilt of the crime charged in the information, and that the court erred in refusing to direct a verdict of not guilty. The grounds for this contention are that the evidence affirmatively shows that the defendant did not assault Agnes Secquist as alleged, and that the defendant and she, from the time they met on the evening in question, had an understanding by which she consented to sexual intercourse, and hence the essential elements of the crime were not proven. The finding of the jury that the defendant committed an assault upon her is abundantly supported by the positive and circumstantial evidence of the case. The jury were fully justified to find this fact from the evidence of Hughes, the persons at the normal school, and all of the details of what took place there and the defendant's conduct as regards giving her the liquor, shown by his evidence and that of the girl and Hughes. Whether such an assault was made with the intent to commit rape is the serious question presented upon this branch of the case. It is insisted that Agnes Secquist's conduct, from the time she communicated with the defendant on the evening of February 22d to the time of the alleged assault on the normal school grounds, conclusively shows that she consented to hav-

ing sexual intercourse with the defendant, and that the evidence therefore fails to establish an essential element of the crime of assault with intent to commit rape. Under the facts and circumstances as disclosed by the evidence, it is important to ascertain how the fact of Agnes Secquist's intoxication affects the question of the defendant's guilt in the matter. The evidence leaves no room for argument but that the jury were warranted in finding that she was intoxicated so as to be insensible and in a stupor at the time it is claimed defendant assaulted her on the normal school grounds. Her evidence, as well as that of Hughes and others who saw her, clearly tends to show that she was in a mental stupor from alcoholic drink which made her insensible and incapable of consenting. This fact has an important bearing in characterizing the assault on her by the defendant, which the jury must be presumed to have found by their verdict. In *Whittaker v. State,* 50 Wis. 518, 521, 7 N. W. 431, in discussing the effect of intoxication as regards the element of nonconsent of the female in rape cases, it is declared:

"In further explanation and palliation of this use of the word [consent], it has been held that forcible connection with a female who is insane, or an idiot, or intoxicated so as to be insensible, or who is deceived, believing the defendant to be her husband, and in other like cases, where the *will* of the female does not concur with the act, or oppose it, and does not act at all, and where she has no power of consenting or dissenting, the act is said to be 'against her will,' and this necessary ingredient of rape is present. 2 Whart. Crim. Law, § 1142, and note *a;* and as in *Walter v. People,* 50 Barb. 144; *People v. Quin,* id. 128; and *Crosswell v. People,* 13 Mich. 427.

"In such cases it is consistent to hold that the act is 'against the will' only because it was not approved by the will, or the will did not concur with the act. In all cases where there is no sensibility or consciousness, or freedom of the will, the act is said to be against the will."

As above stated, the evidence adduced fully sustains the

conclusion that Agnes Secquist was intoxicated so as to be insensible and that if the defendant assaulted her with the intent to commit the crime of rape she was incapable of consenting thereto, and his act must be considered in the light of her incapacitated condition of approving it by her will and be treated as being against her will. The court fully informed the jury that the alleged assault upon her could not be found to constitute the offense of assault with intent to commit rape under the facts and circumstances adduced in evidence, unless they found beyond a reasonable doubt that the defendant in fact assaulted her with such intent and that she was so intoxicated as to be insensible and thus rendered incapable of consenting thereto. The claim that her conduct in arranging with the defendant to meet him and her conduct after meeting him and Hughes shows that she thereby gave her consent to sexual intercourse cannot be considered established as a matter of law in the light of her intoxication and his denial that he had or attempted to have intercourse with her. We therefore consider that the court properly refused to direct the jury to acquit the defendant of the charge preferred against him upon these grounds.

The court informed the jury that the crime of rape necessarily included an assault with intent to rape, and that a defendant charged with the latter offense could be convicted thereof if the jury found a rape had been committed, and proceeded by instructing them as follows:

"If the testimony convinces you beyond a reasonable doubt that the defendant *Francis Quinn* actually had sexual intercourse with Agnes Secquist at the time and place alleged, and that at the time of such intercourse the said Agnes Secquist was so intoxicated as to be incapable of either resisting or consenting to such act, then you should find the defendant guilty as charged. Or, if the testimony convinces you beyond a reasonable doubt that the witness Agnes Secquist, on the night in question, was so intoxicated as to be incapable of either resistance or consent to sexual intercourse, and then the defendant, with knowledge that she was so incapable of

either resisting or consenting, laid hands upon her with the intent then and there to have sexual intercourse with her, then you should find him guilty as charged."

The first part of this portion of the charge is assailed as prejudicially erroneous because it asserts that it is not necessary that the defendant know of her intoxicated condition to warrant a verdict of guilty. It must be borne in mind that the charge preferred against the defendant was an assault with the intent to commit rape, and that the jury were repeatedly informed that this was the offense for which the defendant was being tried. The foregoing instructions must be considered in the light of this fact and the jury must be presumed to have acted in accordance therewith. Examining it from this viewpoint we do not find the instructions prejudicially erroneous, though the first part omits the element of knowledge by the defendant of her intoxication. The jury had their attention specifically directed to the necessity of finding that he must have had knowledge of her condition to authorize them to find him guilty as charged. We cannot think that the omission to bring this to their attention specifically in the first part of this portion of the charge misled them to defendant's prejudice. Furthermore, the evidence on the subject is indisputable, to the effect that defendant must have known the actual condition as to her intoxication brought about through his own acts, and hence the alleged omission complained of in the charge could not have operated to his prejudice by having any of his rights substantially affected thereby. *Reg. v. Camplin,* 1 Den. Crown Cas. 89; *Comm. v. Burke,* 105 Mass. 376.

It is urged that the court erred in charging that if defendant gave Agnes Secquist the liquor with the intention fully formed in his mind of putting her in a condition of insensibility so that she had no power of opposing sexual intercourse with him and with the intent then present in his mind to have such intercourse with her while in such powerless condition, then the giving of the liquor constituted an assault

with intent to commit rape. The charge immediately following this instruction directed the jury that if defendant gave her liquor for the purpose only of inducing her to submit to sexual intercourse with him, then no assault was committed in giving it to her and he could not be held guilty of the crime charged against him. It is clear that the instruction complained of informed the jury that the giving of the liquor by the defendant constituted an assault only if it was done by him with the intent to destroy her power of resistance by reducing her to insensibility and the present intent to have sexual intercourse with her when in that condition. Under such circumstances the assault with intent to commit rape is complete, and we find no objection to the instruction because it did not require that some additional force must be employed by the assailant to that involved constructively in the acts of giving her the liquor with these intents in his mind. There is no dispute but that he took the actual steps of giving her the liquor, and, since the jury found this was done with the criminal intent charged, the essentials of the offense are present. *State v. Lung,* 21 Nev. 209, 28 Pac. 235.

It is argued that the court erred in its charge to the jury in that it did not correctly state the law upon the question of reasonable doubt. We have examined the charge on this subject and find it substantially correct. The phraseology employed is in no way misleading to the jury, and they undoubtedly gave him the benefit of every reasonable doubt.

It is argued that the court erred in refusing to charge as requested upon the effect, in cases of this nature, of outcry or its absence by the person assaulted. Under the evidence of Agnes Secquist's condition, the instruction was immaterial and its omission deprived the defendant of no right. It is also argued that the refusal to give the requested charges as to circumstantial evidence was error. The evidence in the case is largely direct and positive in character and no neces-

sity is shown requiring the jury to resolve any issues on such evidence alone. While the instruction might properly have been given as requested, its rejection cannot reasonably be said to have affected any substantial right of the defendant.

We have examined the case with care and find no reversible error in the record.

By the Court.—Judgment affirmed.

KRUEGER, Respondent, vs. BUEL and others, imp., Appellants.

April 29—May 31, 1913.

Contracts: Exchange of real property: Mental incapacity: Rescission: Waiver of right: Res judicata: Ex parte *proceeding: Certificate of survivorship: Unauthorized recital: Trial: Time consumed: Length of findings and judgment: Miscarriage of justice in allowing costs: Appeal.*

1. In an action to rescind a contract and set aside conveyances by which plaintiff, an infirm and weak-minded woman, exchanged real property worth $6,000 for an equity in other property not worth to exceed $3,000, findings of the trial court to the effect that plaintiff's mental condition was such that she did not comprehend or appreciate what she was doing and that defendants dealt with her knowing her condition are *held* to be sustained by the evidence.
2. Plaintiff did not, in such case, waive her right to rescind by failing to bring suit until nearly six months after the exchange, it not appearing that her mental condition improved in the meantime or that she ever fully appreciated to what extent she had been wronged.
3. A certificate of survivorship, issued by the county court upon petition of the grantee of land, recited the death of the grantor's husband and that thereupon all his right, title, and interest in the land vested in the grantor, and further recited that said grantor had conveyed the premises to the petitioner and that the petitioner "is now the owner in fee simple" thereof. *Held*, that such last recital is not *res judicata* or conclusive against said grantor, she not being in any sense a party to the

proceeding, although she testified, on the hearing, as to the date of her husband's death.

4. The length of time consumed in the preliminary proceedings and in the trial of this case, and the excessive amplitude of the so-called findings and judgment, are criticised; and under ch. 214, Laws of 1913 (sec. 2405*m*, Stats.), it is *held* that, although no exceptions were taken to the allowances mentioned, it was a miscarriage of justice to allow costs for more than four days trial work and to allow any costs to be taxed for the findings and judgment.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed in part; reversed in part.*

In March, 1909, the plaintiff was the owner of a piece of property on Humboldt avenue in the city of Milwaukee on which there was a mortgage of $750. She called on her grocer and advised him that she would like to sell, as she was not getting sufficient income from the property. He in turn called on a real-estate dealer named Leinss in reference to selling the property. Leinss took an option from the plaintiff at $8,500, with an agreement that he was to receive $500 commission on the sale at the price named. Leinss in turn called on *Albert Buel,* a real-estate dealer, in reference to making a disposition of the property, and *Buel* examined it. At this time *Buel* owned two parcels of property consisting of two double-flat buildings, one parcel being located on Thirty-eighth street and one on Center street. The Thirty-eighth street property was incumbered by a mortgage of $3,500, and the Center street property by a mortgage of $3,000. A contract was entered into between the plaintiff and *Buel* whereby the plaintiff agreed to exchange her Humboldt avenue property for the two parcels of property owned by *Buel.* The plaintiff agreed to deed her property free and clear of all incumbrances and to assume and pay the incumbrances, amounting to $6,500, on the two parcels of property which she was

to receive in exchange therefor. The deeds were delivered on March 18, 1909, the deed from the plaintiff running to *Lena Orr,* a sister of the defendant *Buel.* On the same day the plaintiff executed two mortgages, one for $500 on the Thirty-eighth street property which had been conveyed to her and which represented the cash loan made by the defendant *Annie Buel* to her, and one for $750 on the Center street property, also given to the defendant *Annie Buel* to offset the $750 mortgage on the Humboldt avenue property which plaintiff had conveyed. Plaintiff remained in possession of the Humboldt avenue property until April, 1909, at which time she removed to the Center street property which she had taken in exchange, and occupied the same until September, 1909. On April 29, 1909, the plaintiff sold the Center street property to her son Charles W. Krueger for $5,000, subject to the mortgages thereon, aggregating $3,750. On July 11, 1909, the son reconveyed the property to the plaintiff. From March 18, 1909, to September, 1909, the defendant *Buel* collected the rents of the Thirty-eighth street property for the plaintiff and she called at his office monthly to receive the rents. *Buel* also collected the rents for the plaintiff on the Center street property until the same was conveyed to Charles W. Krueger. Thereafter he collected the rents up to July 11, 1909, and for some time thereafter plaintiff collected the rents on the property. On March 18, 1909, *Lena Orr,* in whose name the Humboldt avenue property was taken, executed a mortgage thereon for the sum of $4,500 to *Annie Buel,* the wife of *Albert Buel.* On May 17, 1909, *Annie Buel* assigned this mortgage to the defendant P. B. Weber. The court held that Mr. Weber was a *bona fide* purchaser of the note and mortgage in due course and was entitled to protection as such. After the mortgage was executed *Lena Orr* conveyed the premises to the defendant Arthur Froemming in consideration of $1,550, subject to the mortgage of $4,500

thereon, which had been purchased by Weber. The court found that Froemming purchased with notice of the rights of the plaintiff and that he did not participate in any fraud that was practiced upon her.

The plaintiff brought this action to rescind the contract entered into between herself and *Buel* and to cancel and set aside the deed executed by her to *Lena Orr* and all subsequent conveyances and incumbrances placed thereon.

The findings of fact, if they can be designated such, are very voluminous, and a large number of additional facts are found and recited in the judgment. No useful purpose would be served by attempting to give any synopsis of these findings. The court did find that the property which the plaintiff deeded to the defendants was of the value of $6,000 over and above the incumbrances thereon of $750; that the value of the equity in the properties which she received in exchange therefor did not exceed $3,000, and that the plaintiff's mental condition was such that she was not competent to protect herself in a deal of this kind, and that she had been overreached. The court further found that by reason of the mortgage which had been assigned to the defendant P. B. Weber the status of the parties could not be restored, and that Weber was entitled to foreclose his mortgage as against the plaintiff. The property received by the plaintiff from *Buel* was restored to *Buel,* and he and his codefendants, *Annie Buel* and *Lena Orr* and Ernst Leinss, were required by the judgment of the court to pay $6,000, the value of the property over and above incumbrances conveyed to *Lena Orr* by the plaintiff, which judgment was made a lien on the interest of the defendants in and to the Thirty-eighth street and Center street properties, which were restored to them.

A number of questions involving the equities of the defendants as between themselves were litigated on the trial and are provided for in the findings and judgment, but they are not

material on this appeal. The defendants *Albert Buel, Annie Buel,* and *Lena Orr* appeal from the judgment.

Alfred C. Rudolph and *Fred Doering,* for the appellants.

Moritz Wittig, for the respondent.

BARNES, J. Numerous errors are assigned, but there is really only one vital question involved in the case. The circuit court found that the plaintiff, a woman of fifty-five years of age, had the appearance of and acted like a person of about seventy-five years, was infirm and childish, broken in health, weak-minded and easily susceptible to influence, and that she was practically a helpless cripple and a mental wreck, and that such was substantially her condition when she executed the contract and deed and made the trade outlined in the statement of facts; that she made the trade without consulting her friends or relatives, knew nothing of the value of the properties which she was receiving, did not go inside of the flat buildings before consummating the trade and did not know that they were mortgaged, and that she fell into the hands of persons who were able and willing to take advantage of her.

These findings as well as many others are vigorously assailed by the appellants as not having sufficient support in the evidence. Some of them are highly colored and exaggerated. We have examined the testimony. There is certainly much in the record which tends to show that plaintiff's mental condition was such that she did not comprehend or appreciate what she was doing when she disposed of $6,000 worth of property for an equity in other property which the court finds on sufficient evidence was not worth to exceed $3,000 and also that defendants dealt with her knowing her condition, and it cannot be said that the real material conclusions reached by the court are against the clear preponderance of the testimony. It would serve no useful purpose to set forth the evidence supporting the decision of the circuit judge and it is

not the custom of the court to do so. The case is one where the trial court has had the benefit of seeing and hearing the parties to this controversy. It had opportunities that this court cannot have for arriving at a just conclusion. The trial judge was satisfied that an enfeebled old lady of weak mentality had fallen into the hands of the Philistines and had been overreached by designing and unscrupulous persons who mulcted her out of $3,000, or about one half of her property. The evidence to the contrary is not so clear that we can say that the conclusion is not righteous or that it was not justified by the evidence. The case made by the plaintiff was stronger than many others in this court where conveyances have been set aside for like reasons. *Watkins v. Brant,* 46 Wis. 419, 1 N. W. 82; *Konrad v. Zimmermann,* 79 Wis. 306, 48 N. W. 368; *Cole v. Getzinger,* 96 Wis. 559, 71 N. W. 75.

The conclusion reached on the main question in the case disposes of the contention that the plaintiff waived her right to rescind by not bringing her suit until nearly six months after she made the trade. The evidence does not show that the mental condition of the plaintiff improved any in the meantime or that she ever fully appreciated to what extent she had been wronged in the transaction.

The plaintiff and her husband were joint owners of the Humboldt avenue property during his lifetime, under a conveyance which provided that the entire fee should vest in the survivor. After the conveyance was made to *Lena Orr* she presented a petition to the county court praying that a certificate of survivorship be issued to the plaintiff. The latter appeared as a witness on the hearing of the petition and testified to the date of her husband's death. A certificate was issued reciting the fact of the husband's death and that thereupon all the right, title, and interest of the husband in the premises vested in the plaintiff. The certificate further recited that plaintiff had conveyed the premises to *Lena*

Orr and that said *Lena Orr "is now the owner in fee simple"* of the premises so conveyed. It is urged that this recital in the certificate is *res adjudicata* and precludes the plaintiff from asserting any title to the property which she conveyed to *Lena Orr.*

The proceeding was *ex parte.* The plaintiff was in no sense a party to it. It was not brought to try title or to quiet title. It was brought to supply a missing link in a chain that would show record title in *Mrs. Orr* when the chain was completed. The recital above quoted had no place in the certificate, added nothing to it, and concluded no one. The question is quite similar to that involved in *Nobarak v. Simmons,* 144 Wis. 187, 189, 190, 128 N. W. 971, where the court attempted to dispose of the property of a person not a party to the litigation. In reference to the attempt this court said: "The court was without the slightest semblance of jurisdiction to make the order for confiscation of respondent's money."

This brings us to the consideration of another matter, which we approach with some hesitation, but concerning which we feel obliged to speak. It is seldom that such a record comes to this court as the one before us. The issues were few and simple. The principal question was whether the mental condition of the plaintiff was such that she understood the transaction. Incidentally the values of the properties exchanged and the question of whether Froemming was a purchaser in good faith and whether Weber was a *bona fide* mortgagee were involved. Three or four days should be ample to fully present the case to the court. Instead the trial consumed nearly three weeks. The preliminary proceedings also seem to have taken an unnecessary length of time. There is a denial of justice to the plaintiff in this case to the extent to which she is compelled to pay expenses unnecessarily incurred. Likewise there is an unjustifiable burden of expense cast upon the defendants and upon

the taxpayers who bear the burden of maintaining the courts, which might and should have been largely avoided. Counsel seem to have convinced the court that another "celebrated case" had arisen and that all direct and collateral inquiries must be pursued to the remotest ends or at least until the capacity of counsel to frame questions had been exhausted. Causes should be tried without unnecessary delay and at a minimum of expense, else litigants are not receiving from the courts the consideration to which they are entitled as a matter of right. Interminable examinations and cross-examinations on collateral or immaterial matters should not be tolerated and other examinations should be kept within reasonable bounds. The complete record in this case consists of a judgment roll of 122 pages, the testimony covering 1,330 pages, and 80 exhibits, besides some other papers. In contemplating this mass of material, we are forcibly reminded of Macaulay's reference to the monumental character of Dr. Nare's biography of Lord Burleigh in the opening paragraphs of the essay in which that work is reviewed. It is safe to say that the work has not been read since the essay was published.

The findings and judgment are in harmony with the expansive conception which resulted in the upbuilding of other parts of the record. The court indicated his findings of fact in a written decision which covers but two pages of the printed case. The findings of fact and conclusions of law as drawn and signed travel more or less gracefully over forty-three pages of the case. The judgment contains numerous recitals of evidence that was apparently forgotten or overlooked when the findings were drawn, and that document monopolizes twenty-seven pages of the case. The so-called findings that are labeled findings of fact are not so in fact. They consist largely of recitals of testimony and of declamation and are highly colored and argumentative. All the necessary findings could easily be embodied in five or six pages. We can see but one object that might prompt the

industry of counsel, and that was the desire to tax a large bill of costs against the defendants. That industry might better be directed toward condensation and perspicuity, even if it might prove to be less profitable. The costs taxed for findings alone in this case amounted to $134.07, and for the judgment and copies, $28.65. Besides, costs were taxed for attending trial for sixteen days. Whether the so-called findings and judgment were drawn in good or bad faith, it was a clear abuse of the statute governing the matter of costs to make the allowances which were made. No findings were drawn such as the statute contemplates or such as the decisions of this court hold should be made. The same is true of the judgment. The findings should be a succinct statement of the conclusions reached on the material points in issue. For its own protection this court has the right to insist that the law be observed. No exception was taken to the items of costs referred to as allowed by the court on appeal from the clerk's taxation and no error is assigned thereon in this court. Were it not for the passage of ch. 214, Laws of 1913 (sec. 2405*m*, Stats.), what has been said on this branch of the case would have been omitted, because little good would be likely to result from mere sermonizing. That act reads as follows:

"In any action or proceeding brought to the supreme court by appeal or writ of error, if it shall appear to that court from the record, that the real controversy has not been fully tried, *or that it is probable that justice has for any reason miscarried,* the supreme court may in its discretion reverse the judgment or order appealed from, regardless of the question whether proper motions, objections, or exceptions appear in the record or not, and may also, in case of reversal, direct the entry of the proper judgment or remit the case to the trial court for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with the statutes governing legal procedure, as shall be deemed necessary to accomplish the ends of justice."

We think it was a clear abuse of the statute regulating costs and a complete miscarriage of justice to allow any costs to be taxed for such findings and judgment as were drawn in the present case. They do not comply with the law and seem to be obviously prepared for the purpose of swelling costs. We think it was also a miscarriage of justice to allow an attorney fee for sixteen days of trial work in a case that should have been tried in three or four days. Costs will be allowed for but four days trial work and no costs will be allowed for the findings and judgment.

By the Court.—The part of the judgment awarding costs is reversed with directions to strike therefrom the sum of $198.72. The remainder of the judgment is affirmed. No costs will be allowed in this court, except that the appellants must pay the clerk's fees.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant, vs. RAILROAD COMMISSION OF WISCONSIN, Respondent.

April 29—May 31, 1913.

Public utilities: Street railways: Regulating rates of fare: Legislative power: Delegation to municipalities: Statutes and ordinances construed: Constitutional law: Impairing obligation of contracts: Reserved power to amend franchises: Taking of property without compensation.

1. Authority given by a revised statute (sec. 1862, Stats.) to a municipal corporation to grant to a street railway corporation the use of streets "upon such terms" as the proper authorities shall determine, does not differ from the authority, given by such statute in its original form, to make such grant "upon such terms *and conditions*" as the common council might impose.
2. A municipal ordinance providing that the rate of fare upon a street railway "shall be not to exceed five cents" did not make a fixed rate, as distinguished from a limitation upon the rate,

and was not in that respect substantially different from a prior ordinance providing that the rate of fare "shall not exceed five cents."

3. The power to fix rates and tolls to be charged by public utilities is one of the attributes of sovereignty, and with us is vested in the legislature.

4. No presumption can be indulged that the legislature has parted with such power, nor will doubtful words be construed as having that effect.

[5. Whether the legislature could by express language authorize municipal authorities to make contracts with public utilities fixing rates which should exist for definite periods in the future and be beyond legislative control during those periods, is not determined.]

6. Sec. 1862, Stats.—which provides that any municipal corporation may grant to a street railway company the use, "upon such terms as the proper authorities shall determine," of streets, bridges and parkways for the purpose of laying tracks and running cars thereon, to be propelled by animals or such other power as shall be agreed on, and that every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the municipal authorities may from time to time prescribe,—does not empower municipal authorities to make any contract with a street railway company fixing rates of fare so that they may not be changed by the legislature or through a legislative agency (such as the Railroad Commission) in the manner provided by law.

[7. Whether municipal ordinances relating to rates of fare upon a street railway and claimed to be in the nature of contracts are subject to alteration or repeal under sec. 1, art. XI, Const., not determined.]

MARSHALL and VINJE, JJ., dissent.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an appeal from a judgment dismissing the plaintiff's complaint, after a demurrer thereto had been sustained and the plaintiff had declined to plead over within the time granted by the court. The action is an action brought under the provisions of sec. 1797*m*—64, Stats., to vacate and set aside, as unlawful and unreasonable, an order of the defendant *Commission* purporting to fix certain rates at which

street-car tickets should be sold in packages by the plaintiff over its lines in Milwaukee; which rates were somewhat less than the rates fixed by certain ordinances of the city previously passed. The essential facts are fairly stated in the appellant's brief, substantially as follows:

The complaint shows that the *Milwaukee Electric Railway & Light Company* is incorporated, among other purposes, for the conduct of a street railway, and that it operates a street railway extending throughout the city of Milwaukee over a large number of streets.

The company's present street railway system involves a consolidation of five previous systems. Three of these originally were constructed as horse railways and by authority of the common council changed to electric railways. The fourth originally was planned as a cable railway, but afterwards was authorized to be constructed as an electric railway; and the fifth was constructed as a steam motor or "dummy" road, but subsequently, by due authority, was changed to an electric line.

The plaintiff's street railway is operated under franchises which may be divided into three classes: (1) franchises granted to individuals in 1874, and passing by mesne conveyances to the plaintiff; (2) franchises granted to other street railway corporations and also passing by mesne conveyances to the plaintiff; and (3) a franchise embodied in an ordinance and resolution enacted by the city January 2, 1900, extending all existing franchises, which will be referred to as the "1900 ordinance."

Of the franchises granted to individuals, some were granted to Frank B. Van Valkenburg *et al.* and some to John H. Tesch *et al.* All were granted during the year 1874, and were to extend for a term of fifty years from the time of the grant. Under them the street railway was constructed and is now actually being operated on some of the most important

streets forming the key to the street railway situation in the city of Milwaukee.

The franchises granted to other corporations were embodied in ordinances and resolutions of the city of Milwaukee and cover a number of other streets over which the plaintiff operates.

The so-called "1900 ordinance" was passed January 2, 1900, and granted to the plaintiff the right to operate over certain portions of streets for which it theretofore had no franchises. It provided also that all franchises expiring prior to December 31, 1934, should be extended from the date of such previous expiration to December 31, 1934, and all franchises which otherwise would expire subsequently to December 31, 1934, were made to terminate on that date. The franchise entailed on the company the obligation to give a universal transfer and also to furnish power to swing drawbridges, make certain expenditures for strengthening bridges, and transport on its cars free of charge certain policemen, firemen, and health officers, and contained the following provisions as to rates of fare:

"Sec. 6. After the passage, publication and acceptance of this ordinance by said railway company, the rate of fare for one continuous passage upon the lines of railway within said city limits of said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns, as the case may be, shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three years of age free. Except where cars or carriages shall be chartered at a special price, which fare shall entitle each passenger, upon demand made at the time of payment of fare, to one transfer at established points of transfer to any connecting or cross line of said railway company for passage within said city, and convenient points of transfer shall be

maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordinance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket shall be good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer.

"Provided, however, that after the acceptance of the terms of this ordinance the railway company shall, on demand made at its office in said city, or to the conductors on its cars operated on its lines within the corporate limits of said city, sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets shall entitle the holder thereof to use the same upon the cars of said railway company only between the hours of 5:30 o'clock and 8 o'clock in the morning and between the hours of 5 o'clock and 7 o'clock, central standard time, in the afternoon of each day until January 1, 1905, and shall also entitle the holder to the same privileges as are or may be accorded to passengers paying a cash fare of five cents; and the said railway company shall, from and after January 1, 1905, continue the sale of tickets in packages at the price aforesaid until December 31, 1934, each to be good at all hours of the day, with same privileges as are or may be accorded to passengers paying a single cash fare of five cents."

Of the various ordinances granting franchises, one, that of March 26, 1866, granted to the Milwaukee City Railway Company, one of the plaintiff's predecessors, provided that the rate of fare should not exceed six cents, including the government tax.

All other franchises, including those granted to Van Valkenburg *et al.* and Tesch *et al.*, included a provision that the rate of fare "shall not exceed five cents" except for chartered cars, etc.

The various street railway companies were all acquired by the Milwaukee Street Railway Company, and on foreclosure

of its mortgage passed to the plaintiff in January, 1896. From that time on all these companies were operated by the plaintiff, and the complaint alleges that prior to 1900 the plaintiff was entitled to charge and did charge a cash fare of five cents to each passenger and was not obliged to furnish any transfers whatever.

The plaintiff or its predecessors accepted the various franchises granted to them respectively and fulfilled the terms thereof, and in compliance with the terms of the 1900 ordinance the plaintiff, instead of charging merely a cash fare of five cents as it theretofore had done, sold tickets at the rates prescribed in the ordinance and granted universal transfer privileges.

In November, 1906, the city of Milwaukee filed a complaint with the defendant *Railroad Commission* for a reduction of the rates of fare and filed a second similar complaint on May 13, 1908. In proceedings held on these complaints the *Railroad Commission,* on August 23, 1912, entered the order involved in this case. This order did not interfere with the cash fare, but provided that the company should discontinue its ticket rate of twenty-five for one dollar (the rate prescribed by the 1900 ordinance) and should sell tickets in packages of thirteen for fifty cents, which tickets were ordered to be accepted in payment of fare.

Thereupon the plaintiff instituted this action to vacate and set aside this order and enjoin the execution, performance, and enforcement thereof, and also prayed for a temporary injunction.

For the appellant there was a brief by *Miller, Mack & Fairchild,* attorneys; a separate brief signed by *Sullivan & Cromwell, William J. Curtis,* and *Henry H. Pierce,* of counsel; and oral argument by *Mr. Curtis, Mr. Geo. P. Miller, Mr. Edwin C. Mack,* and *Mr. Pierce.* They contended, *inter alia:*

I. The city ordinances created contracts with reference to

the rate of fare which are property, and are protected by the provisions of the constitutions of the United States and of this state prohibiting the impairment of contracts and the taking of property without compensation. *Walla Walla v. Walla Walla W. Co.* 172 U. S. 1, 9, 19 Sup. Ct. 77; *City R. Co. v. Citizens' R. Co.* 166 U. S. 557, 563, 564, 567, 568, 17 Sup. Ct. 653; *Detroit v. Detroit Citizens' St. R. Co.* 184 U. S. 368, 382, 383, 389, 396–398, 22 Sup. Ct. 410; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 533–536, 24 Sup. Ct. 756; *Cleveland v. Cleveland E. R. Co.* 201 U. S. 529, 541, 26 Sup. Ct. 513; *Minneapolis v. Minneapolis St. R. Co.* 215 U. S. 417, 436, 437, 30 Sup. Ct. 118; *Home T. & T. Co. v. Los Angeles,* 211 U. S. 265, 29 Sup. Ct. 50; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851.

II. The *Commission's* order violates the franchises providing for the rate of fare. (a) The provision that the railways might charge a cash fare of "not to exceed five cents" gave the railways a contract right to charge a five-cent fare. *Detroit v. Detroit Citizens' St. R. Co.* 184 U. S. 368, 22 Sup. Ct. 410; *Minneapolis v. Minneapolis St. R. Co.* 215 U. S. 417, 30 Sup. Ct. 118. (b) The *Commission's* order affects only the price of tickets and that is fixed by the "1900 franchise" beyond question.

III. The legislature had no power against the will of the company to change the terms of the franchises fixing the rate of fare. Sec. 1, art. XI, Const., plainly has reference only to the *formation* of corporations. The grant of a franchise under sec. 1862, Stats., is not a right that comes to a corporation as part of its formation, but it is a separate *subsequent* grant made by the municipality. It is not a corporate power or privilege even under sub. 7 of sec. 31, art. IV. *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851. The distinction is clear between franchises which attach to a corporation as part of its incorporation or

corporate charter and other franchises or governmental privileges. The latter, like any other property owned by a corporation, are not subject to a reserve power attached to the incorporation or formation of the company. *Calumet S. Co. v. Chilton,* 148 Wis. 334, 370, 135 N. W. 131; *In re Southern Wis. P. Co.* 140 Wis. 245, 122 N. W. 801; *People v. O'Brien,* 111 N. Y. 1, 44, 46–52, 18 N. E. 692, 700, 703; *Skaneateles W. W. Co. v. Skaneateles,* 161 N. Y. 154, 55 N. E. 562; *Memphis & L. R. R. Co. v. Railroad Comm'rs,* 112 U. S. 609, 619, 5 Sup. Ct. 599; *Louisville v. Cumberland T. & T. Co.* 224 U. S. 649, 661, 32 Sup. Ct. 572; *Omaha W. Co. v. Omaha,* 147 Fed. 1; *Denver v. New York T. Co.* 187 Fed. 890; *Los Angeles v. Los Angeles C. W. Co.* 177 U. S. 558, 573, 20 Sup. Ct. 736.

For the respondent there were briefs and oral argument by the *Attorney General* and *Walter Drew,* deputy attorney general; by *Lester C. Manson,* special counsel; and by *Daniel W. Hoan,* city attorney of Milwaukee, and *Max Schoetz, Jr.,* of counsel. They argued, among other things:

I. The power to regulate in the public interest the tolls or rates of charge of one engaged in a public service is a police power inherent in the sovereignty of the state. *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 589, 590; *Madison, W. & M. P. Co. v. Reynolds,* 3 Wis. 287; *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167; *Munn v. Illinois,* 94 U. S. 113; *Granger Cases,* 94 U. S. 155, 164, 179–181; *Wabash, St. L. & P. R. Co. v. Illinois,* 118 U. S. 557, 7 Sup. Ct. 4; *Ruggles v. Illinois,* 108 U. S. 526, 531, 2 Sup. Ct. 832; *Railroad Commission Cases,* 116 U. S. 307, 325, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191; *Chicago & G. T. R. Co. v. Wellman,* 143 U. S. 339, 344, 12 Sup. Ct. 400; *Reagan v. Farmers' L. & T. Co.* 154 U. S. 362, 14 Sup. Ct. 1047; *Smyth v. Ames,* 169 U. S. 466, 526; *Cotting v. Kansas City S. Y. Co.* 183 U. S. 79; 84, 85, 22 Sup. Ct. 30; *Louisville & N. R. Co. v. Kentucky,* 183 U. S. 503, 515, 517, 22 Sup. Ct. 95; *Home T. &*

T. Co. v. Los Angeles, 211 U. S. 265, 271, 273, 29 Sup. Ct. 50; *State ex rel. Wis. T. Co. v. Sheboygan,* 111 Wis. 23, 38, 86 N. W. 657; *Madison v. Madison G. & E. Co.* 129 Wis. 249, 264, 108 N. W. 65; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 157, 159, 160, 116 N. W. 905; *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.* 145 Wis. 337, 346, 129 N. W. 600; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 426, 130 N. W. 530; *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 19, 20, 129 N. W. 925; *Chicago, B. & Q. R. Co. v. Railroad Comm.* 152 Wis. 654, 140 N. W. 296. There is no exception in favor of a street railway. *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, 620, 40 N. W. 487; *Hobart v. Milwaukee City R. Co.* 27 Wis. 194, 199, 200; *Fayetteville St. R. Co. v. A. & R. R. Co.* 142 N. C. 423, 55 S. E. 345, 9 Am. & Eng. Ann. Cas. 683; *Comm. v. I. C. St. R. Co.* 187 Mass. 436, 73 N. E. 530, 2 Am. & Eng. Ann. Cas. 419.

II. This sovereign power of regulation is one which belongs exclusively to and can be exercised only by the legislature. *Madison v. Madison G. & E. Co.* 129 Wis. 249, 267, 108 N. W. 65; *Express Cases,* 117 U. S. 1, 29, 6 Sup. Ct. 542, 628, 1190; *Interstate Comm. Comm. v. C., N. O. & T. P. R. Co.* 167 U. S. 479, 505, 17 Sup. Ct. 896. There is no departure from this principle of law, which makes the exercise of the state power of regulation exclusively a legislative function, in ch. 362, Laws of 1905, authorizing the *Railroad Commission* to ascertain and declare the lawful rate. *Chicago & N. W. R. Co. v. Dey,* 35 Fed. 866, 874, 875; *Reagan v. Farmers' L. & T. Co.* 154 U. S. 362, 393, 394, 14 Sup. Ct. 1047; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 161, 163, 164, 116 N. W. 905; *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.* 145 Wis. 337, 346–348, 129 N. W. 600.

III. The city of Milwaukee was not authorized to abrogate by ordinance or contract the sovereign power of the state to

regulate appellant's rates. It had no general power as a municipality to make a contract in its business or proprietary capacity fixing appellant's rates of fare. It had no general power, by delegation from the legislature in the exercise of state agency authority, to regulate appellant's fares and so confer the rights claimed by appellant by surrender of such power. Sec. 1862, Stats., expressly empowered the city to grant appellant only *the use of its streets* "upon such terms as the proper authorities shall determine." In granting such a privilege of street user the municipality acts as agent of the state. It is a franchise grant by the state acting through the municipality. *State ex rel. Att'y Gen. v. Madison St. R. Co.* 72 Wis. 612, 619, 620, 40 N. W. 487; *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29, 36, 69 N. W. 791; *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 27, 129 N. W. 925. The act of a municipal council in passing a franchise ordinance conferring upon a street railway company the right of street user is legislative in character, and such ordinances only cover, and could only cover, such rights as the common council had power to grant. *Lange v. La Crosse & E. R. Co.* 118 Wis. 558, 562, 95 N. W. 952; *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.* 145 Wis. 337, 129 N. W. 600. Such grants must be strictly construed in the interests of the public and of the preservation of the powers of government. *Ruggles v. Illinois,* 108 U. S. 526, 2 Sup. Ct. 832; *Railroad Commission Cases,* 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191; *Home T. & T. Co. v. Los Angeles,* 211 U. S. 265, 29 Sup. Ct. 50; *Georgia R. & B. Co. v. Smith,* 128 U. S. 174, 9 Sup. Ct. 47; *Stone v. Farmers' L. & T. Co.* 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191; *Freeport W. Co. v. Freeport,* 180 U. S. 587, 21 Sup. Ct. 493; *Danville W. Co. v. Danville,* 180 U. S. 619, 21 Sup. Ct. 505; *Rogers Park W. Co. v. Fergus,* 180 U. S. 624, 21 Sup. Ct. 490; *Northern Pac. R. Co. v. Minnesota,* 208 U. S. 583, 28 Sup. Ct. 341; *Knoxville W. Co. v. Knoxville,* 189 U. S. 434, 23 Sup. Ct. 531. The

power of the city to impose "terms" cannot be construed to enlarge the power conferred upon the city so as to include the different and distinct power to grant to appellant the additional privilege of charging unreasonable and unlawful rates or to grant it immunity from governmental control and *thus make the city's grant with terms greater than an unconditional grant without terms.* Immunity from governmental control of the rates of a public service company can only be by positive and express grant of the legislature.

IV. The provisions of the franchise ordinance relating to rates of fare are mere limitations upon the company's right to charge, and do not confer on the company an irrevocable grant or binding contract right to charge the rates of fare named.

V. The legislature has power to regulate appellant's rates of fare as a valid exercise of the power reserved to it under sec. 1, art. XI, Const. *Madison, W. & M. P. Co. v. Reynolds,* 3 Wis. 287, 296; *Pratt v. Brown,* 3 Wis. 603, 611, 615, 616; *Nazro v. Merchants' Mut. Ins. Co.* 14 Wis. 295, 299, 300; *Kenosha, R. & R. I. R. Co. v. Marsh,* 17 Wis. 13, 17; *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167, 198; *Pick v. Rubicon H. Co.* 27 Wis. 433, 440; *State v. Milwaukee G. L. Co.* 29 Wis. 454, 461; *Chapin v. Crusen,* 31 Wis. 209, 215; *West Wis. R. Co. v. Trempealeau Co.* 35 Wis. 257, 270, 271; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 569–574, 576, 579; *State ex rel. Cream City R. Co. v. Hilbert,* 72 Wis. 184, 192, 194, 195; *Ashland v. Wheeler,* 88 Wis. 607, 616, 60 N. W. 818; *State v. Railway Cos.* 128 Wis. 449, 505, 108 N. W. 594; *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 28, 29, 129 N. W. 925; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 415, 417, 130 N. W. 530; *Tomlinson v. Jessup,* 15 Wall. 454; *Sinking Fund Cases,* 99 U. S. 700, 730; *Close v. Glenwood Cemetery,* 107 U. S. 466, 477, 2 Sup. Ct. 267; *Shields v. Ohio,* 95 U. S. 319, 324; *Spring*

Valley W. W. Co. v. Schottler, 110 U. S. 347, 353, 356, 4 Sup. Ct. 48; *Hamilton G. L. & C. Co. v. Hamilton,* 146 U. S. 258, 270, 13 Sup. Ct. 90; *Northern Cent. R. Co. v. Maryland,* 187 U. S. 258, 268, 269, 23 Sup. Ct. 62; *Stanislaus Co. v. San Joaquin & K. R. C. & I. Co.* 192 U. S. 201, 211–213, 24 Sup. Ct. 241; *Fair Haven & W. R. Co. v. New Haven,* 203 U. S. 379, 388–390, 27 Sup. Ct. 74; *Calder v. Michigan,* 218 U. S. 591, 600, 31 Sup. Ct. 122; *Matthews v. Corporation Comm'rs,* 97 Fed. 400, 404.

VI. The regulation of appellant's rates of fare is not a taking of its property within the inhibitory provisions of state or federal constitutions or within the recognized limitation upon the reserved power. The exercise of such inherent authority or power reserved is an act strictly *in accordance with the contract* and not an impairment of it, or a taking of property.

WINSLOW, C. J. We are much indebted to counsel for the illuminating briefs and able oral arguments with which we have been favored by both sides in this case. It is but just to say that our labors have been much lightened thereby.

The case, however, is not in itself complicated or difficult of statement. There is in fact but a single question, and that is whether the ordinances referred to in the statement of facts, so far as they specify the rates of fare which may be charged, constitute contracts which are protected by the state and federal constitutions from impairment.

On the part of the appellant the familiar principle is relied on that where municipal authorities, acting under clear and unmistakable legislative authority so to do, have granted the use of streets to a public utility corporation for the purpose of serving the people, and the grant has been accepted by the utility and performance entered upon, a contract has been created between the public and the corporation, which cannot

be impaired by subsequent legislation. *Walla Walla v. Walla Walla W. Co.* 172 U. S. 1, 19 Sup. Ct. 77; *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29, 69 N. W. 791. We do not understand that it is seriously questioned by the respondent in the present case that so far as the use of the streets is concerned the grants contained in the ordinances before us became contracts which, when accepted and acted upon, could not be subsequently impaired by legislation. The primary contention of the respondent is, however, that so far as the rates of fare are concerned the legislature has not given to municipal authorities the power to hamper future legislative action in any way, and that the ordinances in question, when fairly construed, do not attempt to do so.

This contention involves primarily careful consideration and construction of the language of the statute under which the city acted in passing the ordinances in question.

The statute in question now appears as sec. 1862, Stats. 1911, and provides that any municipal corporation or county may grant to a street railway corporation, or to any person who has the right to construct, maintain, and operate street railways, "upon such terms as the proper authorities shall determine," the use of streets, bridges, and parkways for the purpose of laying tracks for street railway purposes, the cars to be propelled by animals or such other power as may be agreed upon. The section further provides that every such road shall be constructed on the most approved plan and be subject to "such reasonable rules and regulations and the payment of such license fees" as the municipal authorities may from time to time prescribe. This section first appeared in substance upon the statute books of the state as ch. 313 of the Laws of 1860. So far as the questions involved in this case are concerned there has been no substantial change in the language or legal effect of the statute since its enactment in 1860. In the original act the grant of the use of the streets

was authorized to be made "upon such terms and *conditions*" as the common council might impose. In the revision of 1878, however, the act of 1860 was condensed into one section (sec. 1862), and in the process of condensation the word "conditions" was dropped out as surplusage, which it plainly was.

The various ordinances, prior to the ordinance of 1900, provided that the rate of fare "shall not exceed five cents," except for chartered cars, etc. The ordinance of 1900 changed this language somewhat and provided that the rate of fare "shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three years of age free." The last named ordinance also made elaborate provision for transfers and provided that the company "shall" sell tickets in packages of twenty-five for one dollar, etc., as will more fully appear by examination of sec. 6 of the ordinance, which is printed in full in the statement of facts. Some contention is made by the appellant to the effect that the difference in language between the earlier ordinances, which provide that the fare "shall not exceed five cents," and the ordinance of 1900, which provides that the fare "shall be not to exceed five cents," is indicative of a purpose in 1900 to make a fixed rate instead of placing a limitation upon the rate, but we do not regard the change in language as of any substantial significance. The two phrases seem to us as indicating the same essential purpose.

In construing the meaning of the statute in question, certain fundamental considerations must be kept clearly in mind if we would reach correct and just conclusions, and some of the more important of these considerations will first be stated.

The power to fix rates and tolls to be charged by public

utilities is one of the attributes of sovereignty. With us this great power is vested in the legislature, and when the legislature speaks upon the subject its voice is controlling and supreme, unless indeed some constitutional guaranty is invaded. *Madison v. Madison G. & E. Co.* 129 Wis. 249, 108 N. W. 65. A century ago this great power was of little practical importance, and very seldom used. The public utility as we know it had not yet come. Life was comparatively simple, individual wants few, and individual resources generally sufficient to provide for them. The ordinary citizen knew little about gas and less about electricity, which he regarded as nothing more than a supernatural and remorseless destroying force. He drove his own horse, if fortunate enough to own one, drank water from his own well, had no telephone, sent no telegrams, used no railroad, sent no express packages, and was dependent upon no public utility, either for the necessities or the luxuries of life. No such life is possible today, however. The progress of science and invention, combined with the tremendous growth of congested urban areas, has made the great mass of the people absolutely dependent upon the great public utilities of the time. Modern business and modern life could not go on without them. The urban citizen of today goes to his business upon the street railway and transacts it with the aid of the telegraph, the telephone, the express company, and the commercial railway. The gas and electric companies light his home, cook his meals, furnish him power for domestic operations, and sometimes even furnish him heat; while water companies provide him with water and telephone companies afford him opportunity at any moment for conversation with friends either at home or in distant cities.

We must catalogue our public utilities and try to imagine how we would get along without them if we would realize our dependence upon them. Only by so doing can we appreciate the supreme importance of the rate-making power and

the necessity of keeping that power intact in the hands of the legislature. If it be not so kept the opportunities for abuse are numerous. Clearly the legislature should not part with the power, even for a limited time, except upon the most potent and convincing considerations.

No presumption can be indulged that it has parted with the power, nor will doubtful words be construed as having that effect. He who asserts that the state has surrendered any part of its sovereign power even temporarily in his favor must prove the fact by the most convincing evidence. The presumptions, if any there be, must run the other way. If it were to be admitted for the purposes of the argument that the legislature could by express language authorize municipal authorities to make contracts with public utilities fixing rates which should exist for definite periods in the future and be beyond legislative control during those periods (a proposition concerning which we intimate no opinion), the question here is whether such express language is to be found in sec. 1862.

The section does not contain the word "contract," nor any words of similar import, except that the provision relating to the motive power provides that the cars shall be propelled by animals, or "such other power as shall be agreed on." The word "grant" is, of course, a contract word, but the grant simply covers the right to the use of the streets; nothing else is specifically authorized to be "granted." This grant is to be upon "terms." Not such terms as may be agreed on (as in the case of the motive power), but such terms as the municipal authorities "shall determine." Here clearly is language appropriate to the exercise of power by the municipal authorities, rather than to the making of a contract; to the imposition of commands by a superior power rather than to the reaching of a result by negotiation and agreement between equals.

Assuming that under this language a city might make a contract with a public utility, fixing rates or tolls for a definite period, which would bind the city itself and prevent any change of rates by the city authorities during the contract period, the question still remains whether the section can be construed as giving the city authorities any power to bargain away the sovereign right of the state to regulate fares and tolls and lower them, if found to be excessive.

If this question were a new one in this state we should entertain no doubt that it should be answered in the negative, but we do not regard it as new.

In the case of *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925, the question of the proper construction of sec. 1863, Stats., with regard to the extension of street railways into adjoining towns and through other cities, so as to constitute interurban lines, was before the court. In that case the city of Manitowoc had by ordinance, passed in November, 1902, fixed the fare to be charged between the cities of Manitowoc and Two Rivers at ten cents, and the ordinance had been accepted by the interurban company, the track laid, and the line operated until May 1, 1909, when the company raised the fare to fifteen cents, and the city brought its action in equity to compel the interurban company to abide by its contract and carry all passengers at the contract rate. It was strenuously urged in that case that the ordinance and acceptance formed a contract between the state and the company, which could not be impaired by the legislature itself, while it was contended on the other side that the Railroad Commission Act had already amended and superseded the ordinance. This contention brought the question of the power of the legislature squarely into the case, and made it not only proper but really necessary to determine whether by the passage and acceptance of the ordinance the power of the state to regulate fares had been suspended. Upon these contentions it was held that while the ordinance and its acceptance

constituted a contract which bound the interurban company to carry passengers at the ten-cent rate in the absence of legislative action, still the power of the legislature to regulate rates had not been in any way impaired by the action of the city and the company. In this connection this court then said:

"No specific authority having been conferred on the city to enter into the contract in question, the right of the state to interfere whenever the public weal demanded was not abrogated. The contract remained valid between the parties to it until such time as the state saw fit to exercise its paramount authority, and no longer. To this extent, and to this extent only, is the contract before us a valid subsisting obligation. It would be unreasonable to hold that by enacting sec. 1862, Stats. (1898), or sec. 1863, Stats. (Supp. 1906: Laws of 1901, ch. 425), the state intended to surrender its governmental power of fixing rates. That power was only suspended until such time as the state saw fit to act."

If it be said that sec. 1863 was in question in that case instead of sec. 1862, and hence that the language cannot be considered as decisive, the answer is that so far as the question here presented is concerned the provisions of the two sections are practically identical. Sec. 1862 authorizes the municipal authorities to "grant" the use of streets "upon such terms" as they shall determine, and sec. 1863 authorizes "consent" to the use of streets "upon such terms" and subject to such rules and regulations and the "payment of such license fees as the council or board may from time to time prescribe." We are of opinion, therefore, that the holding in the *Manitowoc Case,* to the effect that neither section indicated any legislative intention of surrendering the sovereign power of the state to regulate fares, was entirely correct and was advisedly made.

The appellant places great reliance upon the cases of *Detroit v. Detroit Citizens' St. R. Co.* 184 U. S. 368, 22 Sup. Ct. 410; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517,

24 Sup. Ct. 756; and *Minneapolis v. Minneapolis St. R. Co.* 215 U. S. 417, 30 Sup. Ct. 118. In none of these cases, however, was the question here presented before the court. Those cases were all actions between the city and a street railway company operating under a city ordinance, passed under legislative authority, fixing the rates of fare to be charged, which ordinance had been accepted by the company, and in each of them the city had endeavored to lower the rates of fare by subsequently enacted ordinances. In each case it was held that the ordinance and its acceptance constituted a contract between the city and the company which was binding on both parties during its term, and hence that the subsequent ordinance attempting to lower the contract rate of fare was an attempt to impair the obligations of a contract, and void. This was practically the decision of this court in the *Manitowoc Case,* and these cases were there cited. In no way, however, do they affect the question whether the *legislature of the state* has lost its sovereign power to fix reasonable rates.

The case here is much more similar in principle to the case of *Georgia R. & B. Co. v. Smith,* 128 U. S. 174, 9 Sup. Ct. 47, where the legislature in 1833 had chartered a railroad, and authorized it to charge tolls and rates of fare "not exceeding" certain specified sums. It was argued on behalf of the railroad company that by this clause the railroad was exempted from legislative interference with its rates within the designated limits for all time. This contention was however rejected, and it was said that "to effect this result the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power [*i. e.* the power to regulate rates] by the state."

It is unnecessary to consider other questions which were much discussed by counsel in the present case. If under sec. 1862 no power was given to municipal authorities to hamper

or impair the sovereign right of the state to regulate fares, then the ordinances in question cannot, of course, affect that power, whatever may be their terms. So far as the state is concerned the ordinance constitutes no obstacle to the exercise of its power to regulate rates.

We reach this conclusion the more readily because this state has adopted an eminently just and wise policy in dealing with the matter of rates and tolls. By the Railroad Commission legislation it has laid down the general rule that every rate must be reasonable, and has left it to a commission of experts to determine, after full investigation, the reasonable rate, and apply it. It is believed that this board passes on these questions with judicial fairness after the most careful and searching investigation of the conditions, and with a single eye to the attainment of a fair result. So long as these provisions of law remain in force and are allowed to control the situation, all danger of immature, hasty, or vindictive changes in rates is practically eliminated. On the one hand, the citizen is protected from unreasonable and excessive fares; on the other, the capitalist and investor is assured a reasonable and fair return upon his investment. No door is open for any serious injustice.

The view which is here taken of the meaning and effect of the provisions of sec. 1862 renders unnecessary any consideration of the question whether the ordinances in question are subject to alteration or repeal under sec. 1 of art. XI of the constitution, which authorizes the enactment of general laws for the formation of corporations without banking powers, and forbids the creation of corporations by special act except in certain instances, and reserves the right to alter or repeal at any time all such general laws or special acts.

The proposition decided in this case is that sec. 1862, Stats., does not empower municipal authorities to make any contract with a street railway company fixing rates of fare so

that they may not be changed by the legislature, or through a legislative agency in the manner provided by law.

By the Court.—Judgment affirmed.

TIMLIN, J. (*concurring*). Acting upon complaint of the city of Milwaukee the *Railroad Commission* of this state, in the exercise of power conferred upon it by secs. 1797—1 to 1797—38, Stats., on August 23, 1912, made an order requiring the appellant to discontinue its ticket rate of twenty-five tickets for one dollar, and to sell, through its conductors, tickets in packages of thirteen for fifty cents, each ticket to entitle the bearer to one continuous passage in the same general direction with privilege of one transfer between the single-fare points, upon the city lines of the appellant.

Before their compilation into what is now known as the Wisconsin Statutes, the acts of the legislature above referred to and the powers of the *Railroad Commission* thereunder were considered by this court in *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 136 Wis. 146, 116 N. W. 905. It was there held that these statutes, declaring that railroad rates and services shall be reasonable and creating a commission with power to investigate existing rates and services and to fix and determine what rates and services are reasonable and providing that the rates and services so fixed shall be in force, are valid acts of legislation, and that conclusion is not questioned in the instant case, but is here mentioned as descriptive of the proceedings in which the order of the *Railroad Commission* is made. Under these statutes the appellant brought an action in the circuit court for Dane county against the *Railroad Commission* to review the said order of the latter, averring said order to be unlawful and unreasonable because the order and any law authorizing the same is a law impairing the obligation of contracts, depriving the plaintiff of property without due process of law, and in vio-

lation of the constitution of the United States and of that of the state of Wisconsin. The *Railroad Commission* interposed a general demurrer to the complaint. This demurrer was sustained, and the appellant elected to stand upon said complaint and refused to amend, whereupon judgment was entered dismissing the complaint, thereby affirming the order of the *Railroad Commission*. No case is made for relief on the ground that the order in question is confiscatory in that it deprives the appellant of a fair return upon its property invested, and the arguments in this court are not directed to that point. The only point made is that the order of the *Railroad Commission* and the statutes under which it is made are invalid as impairing the obligation of a contract. In order to bring the case within that paramount rule of law, the appellant avers its corporate character and shows the magnitude of its property and operations, that it operates under and by virtue of a certain ordinance or resolution duly enacted by the mayor and common council of the city of Milwaukee on January 2, 1900, which contained, among other things, the following:

"Sec. 6. After the passage, publication and acceptance of this ordinance by said railway company, the rate of fare for one continuous passage upon the lines of railway within said city limits of said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns, as the case may be, shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three years of age free. Except where cars or carriages shall be chartered at a special price, which fare shall entitle each passenger, upon demand made at the time of payment of fare, to one transfer at established points of transfer to any connecting or cross line of said railway company, for passage within said city, and convenient points of transfer shall be

maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordinance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket shall be good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer.

"Provided, however, that after the acceptance of the terms of this ordinance the railway company shall, on demand made at its office in said city, or to the conductors on its cars operated on its lines within the corporate limits of said city, sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets shall entitle the holder thereof to use the same upon the cars of said railway company only between the hours of 5:30 o'clock and 8 o'clock in the morning and between the hours of 5 o'clock and 7 o'clock, central standard time, in the afternoon of each day until January 1, 1905, and shall also entitle the holder to the same privileges as are or may be accorded to passengers paying a cash fare of five cents; and the said railway company shall, from and after January 1, 1905, continue the sale of tickets in packages at the price aforesaid until December 31, 1934, each to be good at all hours of the day, with same privileges as are or may be accorded to passengers paying a single cash fare of five cents."

The rights and privileges granted by this ordinance and all other ordinances therein mentioned and hereinafter referred to were made to expire on December 31, 1934. The ordinance provided for acceptance in writing by the appellant, and the appellant did so accept.

In addition to the usual consideration implied by such acceptance and undertaking of the duties imposed and the disbursement of money in construction, the appellant set forth that prior to and at the time of the enactment of said ordinance of January 2, 1900, it had succeeded, on the reorganization of a corporation called the Milwaukee Street Rail-

way Company, to all the property, franchises, rights, powers, and privileges of the latter. Among these were several separate and distinct franchises, rights, powers, and privileges granted by the legislature of Wisconsin through the agency of the city and in the form of ordinances and resolutions adopted by the mayor and common council of Milwaukee, making grants to several separate and distinct corporations, to each of which the Milwaukee Street Railway Company succeeded by mesne conveyances from each of the separate corporations owning such franchises. Each of these franchises or grants covered the use of streets in distinct parts of the city and authorized the grantee to charge a five- or six-cent cash fare, provided for no commutation rates and no transfer privileges to the other lines. The appellant and each of the aforementioned corporations (except one incorporated by special act March 28, 1865) were stock corporations organized under the general incorporation laws of this state, and the term "mesne conveyances" as here used includes all modes of transfer.

While in possession of and operating said properties under the several franchise ordinances mentioned, the franchise ordinance of January 2, 1900, was enacted and accepted by the appellant. In accepting said last mentioned ordinance it is averred that the appellant surrendered to the city valuable rights under the prior existing ordinances and made certain concessions, substantially as follows: Appellant by such acceptance agreed that all said franchise ordinances should expire December 31, 1934; agreed to sell commutation tickets at the reduced rates mentioned; agreed to furnish the city electric power to swing drawbridges and to make improvements in streets prior to repaving thereof, to transport on its cars free of charge members of the police, fire, and health departments of said city when in uniform, also detectives of the police department, and to maintain transfer points and give

transfers on its lines of railway, to strengthen and rebuild bridges over which its tracks might extend at its own expense, and to extend its tracks to the city limits when required; and that it has performed upon its part. The ordinance of January 2, 1900, which is made part of the complaint, imposes these and other obligations. By sec. 3 of that ordinance all rights reserved or secured to the city by and under all ordinances in force or by the laws of Wisconsin relating to regulating the speed and headway of cars, etc., and everything connected with the exercise of the rights thereby or theretofore granted to said railway company and its predecessors, are reserved to the city the same as though that ordinance had not been passed. By sec. 7 all rights, privileges, grants, and franchises theretofore granted by said city to said railway company and the several corporations or parties from or through whom it has acquired the same are confirmed and granted to the appellant, its successors and assigns, except as modified or changed by the ordinance of January 2, 1900.

It is noticeable that all the incorporations except the earliest, viz. that of March 28, 1865, of John Plankinton and associates, were under the general incorporation laws of this state, and all the franchise ordinances authorizing the construction and operation of the street railways in the streets of the city of Milwaukee were enacted by the mayor and common council in the exercise of the power delegated to that body by sec. 1862, Stats., which first appears as ch. 313, Laws of 1860, then became sec. 1862, R. S. 1878, amended by ch. 219, Laws of 1881, then became sec. 1862, Stats. (1898), and preserves that number in the present compilation called the Wisconsin Statutes. The act of 1860 authorized any municipal corporation to grant such use as it should deem proper of any street or streets within the limits of such corporation to any street railway company organized under general or special act of the legislature of this state or to any individual,

etc.; . . . "such grant to be made by the common council of any such municipal corporation, upon such terms and conditions as they may impose, and with such privileges as may be necessary, reasonably, to secure the objects of the grant." This act was carried into the revision of 1878 as sec. 1862 and the language condensed and changed somewhat. "Such use as it shall deem proper" became "the use," and "upon such terms and conditions as they may impose" became "upon such terms as the proper authorities shall determine." But there was manifestly no intention to make any material change in the law. *State ex rel. Bergenthal v. Bergenthal,* 72 Wis. 314, 39 N. W. 566.

It has long been the law of this state that grants of corporate powers or privileges are strictly construed and nothing will be held to pass by implication. *Janesville B. Co. v. Stoughton,* 1 Pin. 667. And even in the case of natural persons something equivalent to an express contract seems to have been thought necessary. *Chapin v. Crusen,* 31 Wis. 209. Where an act of the legislature or a city ordinance is claimed to create an irrepealable contract it will be strictly construed in favor of the state or city. *State ex rel. Cream City R. Co. v. Hilbert,* 72 Wis. 184, 39 N. W. 326. This is also the rule of the United States supreme court. *Detroit Citizens' St. R. Co. v. Detroit R. Co.* 171 U. S. 48, 18 Sup. Ct. 732.

By art. 2 of the articles of compact contained in the Northwest Ordinance enacted prior to the constitution of the United States, by sec. 10 of art. I of the constitution of the United States, and by sec. 12 of art. I of the constitution of this state, laws impairing the obligation of contracts are prohibited. If a contract when made was valid by the constitution and laws of the state as then expounded by the highest state authorities, no subsequent action by the state legislature or judiciary can impair its obligation. *Chicago v. Sheldon,* 9 Wall. 50. A state cannot by amendment of its constitution or by the

adoption of a new constitution impair the obligation of an existing contract. *Gunn v. Berry,* 15 Wall. 610; *Fisk v. Jefferson Police Jury,* 116 U. S. 131, 6 Sup. Ct. 329; *Shreveport v. Cole,* 129 U. S. 36, 9 Sup. Ct. 210. The interdict is not, however, unlimited. The provision in question does not protect contracts made in breach of a public trust. *Ill. Cent. R. Co. v. Illinois,* 146 U. S. 387, 13 Sup. Ct. 110. Nor contracts void as against public policy of the United States. *Taylor v. Thomas,* 22 Wall. 479. Nor an incomplete contract. *Garrison v. New York,* 21 Wall. 196. Nor does it operate to limit the police power of the state so as to prevent legislation in the interest of public health, morals, or safety. *Stone v. Mississippi,* 101 U. S. 814; *Chicago, B. & Q. R. Co. v. Nebraska,* 170 U. S. 57, 18 Sup. Ct. 513; *Beer Co. v. Massachusetts,* 97 U. S. 25; *Fertilizing Co. v. Hyde,* 97 U. S. 659. Nor a contract made under delegated authority so far as it exceeds the delegated power. *Water, L. & G. Co. v. Hutchinson,* 207 U. S. 385, 28 Sup. Ct. 185; *Home T. & T. Co. v. Los Angeles,* 211 U. S. 265, 29 Sup. Ct. 50; *Milhau v. Sharp,* 27 N. Y. 611, 84 Am. Dec. 314; *Lake Roland E. R. Co. v. Baltimore,* 77 Md. 352, 26 Atl. 510, 20 L. R. A. 126; *East St. Louis v. East St. Louis G. L. & C. Co.* 98 Ill. 415, 448. Nor a gratuity founded upon no good or valuable consideration. *Tucker v. Ferguson,* 22 Wall. 527; *West Wis. R. Co. v. Trempealeau Co.* 93 U. S. 595; *Salt Co. v. East Saginaw,* 13 Wall. 373.

If this clause of the federal constitution were limited to executory contracts, the questions arising thereunder would not be so serious and far-reaching, for these executory contracts must in a comparatively short time be either performed or breached and so pass out of existence, satisfied by performance or existing as a right of action for damages or specific performance, closed by recovery or barred by statutes of limitations. But it was early decided that after performance there

remains an implied contract that neither party to the original contract shall retake, but that each shall enjoy the rights transferred in the execution of the contract. *Fletcher v. Peck,* 6 Cranch, 87; *Terrett v. Taylor,* 9 Cranch, 43; *Dartmouth College v. Woodward,* 4 Wheat. 518; *Green v. Biddle,* 8 Wheat. 1; *Hamilton v. Brown,* 161 U. S. 256, 16 Sup. Ct. 585. Within this rule and subject to the foregoing limitations, charters to corporations other than municipal are, with reference to all contractual features thereof, considered grants and not to be impaired by subsequent legislation. *State Bank v. Knoop,* 16 How. 369; *Pearsall v. G. N. R. Co.* 161 U. S. 646, 16 Sup. Ct. 705; *People ex rel. Schurz v. Cook,* 148 U. S. 397, 13 Sup. Ct. 645.

"As applied to corporations, every grant of franchises is a charter. It may be a grant of the mere franchise of being a corporation or a grant of powers to a corporation already in existence. In either case the grant is the company's charter to exercise the rights and privileges and enjoy the immunities granted. Bouvier defines the word 'charter' to be a grant made by the sovereign either to the whole people or to a portion of them, securing to them the enjoyment of certain rights. Bouvier's Law Dic. 'CHARTER.' 'All franchises,' says Chief Baron COMYN, 'are derived from the king and ought to be claimed by charter.' Com. Dig. 'FRANCHISES,' A 71. 'Besides the charter of incorporation, a body politic has granted to it other charters, by which the crown, from time to time, adds to or modifies the powers,' etc. Grant, Corp. 13." *State v. Comm'r of R. R. Taxation,* 37 N. J. Law, 228, 237.

Without express definition this rule is made one of the bases of decision in *Tomlinson v. Jessup,* 15 Wall. 454.

"The charter of a corporation formed under a general law consists of its articles of association and the law under which it is organized." *Bent v. Underdown,* 156 Ind. 516, 60 N. E. 307; *O'Brien v. Cummings,* 13 Mo. App. 197; *State ex rel. Ross v. Anderson,* 31 Ind. App. 34, 67 N. E. 207; *State ex rel. Arosin v. Ehrmantraut,* 63 Minn. 104, 65 N. W. 251.

This is supported by many decisions of the supreme court of the United States and of this court, in which distinct and separate statutes, enacted long after the corporation was organized and in existence, are treated as part of the charter and within or without the rule of *Dartmouth College v. Woodward,* 4 Wheat. 518, as the case might be; or within or without the reserved power to repeal or alter corporate charters as the case might be. Among such cases are *State v. Railway Cos.* 128 Wis. 449, 108 N. W. 594; *Water Power Cases,* 148 Wis. 124, 134 N. W. 330; *State ex rel. Cream City R. Co. v. Hilbert,* 72 Wis. 184, 39 N. W. 326; *West Wis. R. Co. v. Trempealeau Co.* 35 Wis. 257.

Grants by the state to a corporation of property, tangible or intangible, not in the nature of franchises, made upon a consideration moving from the corporation, are easily within the rule of the foregoing cases whether such grants be part of the corporate charter or not. Corporations are on a par with natural persons in this respect. As to all statutes which form part of the corporate charter and which confer status, create obligations, or grant or impose powers or duties which the state is powerless to confer, create, grant, or impose without the consent of the natural persons affected, there is also a contract consummated by such consent. This also includes charter provisions indispensable to the maintenance of the status, the performance of the obligation, or the exercise of the powers. But as regards other provisions found in a charter imposing obligations or conferring powers which the state might impose or confer upon any person or class without the consent of the latter, there is no element of contract.

In the instant case two questions are presented: (1) Was a contract in form fixing the rates of fare to be charged during the life of the franchise ordinance of 1900 entered into by and between the city and the appellant? Was a power delegated by the state to the city to make a contract which would

for the life of the franchise prevent the state from exercising its power to fix other and reasonable rates? This last cannot be justly or fully ascertained or determined without considering (a) what power the state had, and (b) what power did it intend to delegate. Because of the rule of law that reasonable doubts must be resolved in favor of the constitutionality of an act of the legislature we cannot correctly answer (b) without considering (a). The provision of the ordinance of 1900 that the rate of fare shall be not to exceed five cents is neither more nor less than a provision that the rate of fare shall not exceed five cents. Attempted distinction reduces itself to hypercriticism. Standing alone, this provision would be the mere fixing of a maximum above which the fare could not be raised by the corporation, within the rule of *Georgia R. & B. Co. v. Smith,* 128 U. S. 174, 9 Sup. Ct. 47; *Rogers Park W. Co. v. Fergus,* 180 U. S. 624, 21 Sup. Ct. 490, and cases cited. The *Railroad Commission* did not disturb this five-cent fare. But this provision does not stand alone, and is not in question on this appeal except for the purpose of aiding in the construction of that part of the franchise ordinance involved which asserts that "after the acceptance of the terms of this ordinance the railway company shall on demand made at its office in said city or to the conductors on its cars . . . sell tickets in packages of twenty-five for one dollar . . . each of which shall entitle the holder thereof to the same privileges as are or may be accorded to passengers paying a cash fare of five cents; and . . . shall continue the sale of tickets in packages at the price aforesaid until December 31, 1934." Privileges to which a cash fare entitles the payer are not only transportation and the care and accommodations due a passenger, but also "one transfer at established points of transfer to any connecting or cross line of said railway company for passage within said city." This last, as appears by the complaint, was a matter of compromise and agreement be-

tween the city and the street railway company, the latter surrendering a right or at least a *bona fide* claim to charge, according to existing franchises, a five-cent fare on each of its several lines without transfers, and accepting this substitute and making the concession above quoted. In construing this ordinance for the purpose of ascertaining whether or not it constitutes a contract in the particular mentioned, we must assume for that purpose that the city had authority to contract. In other words, to get the true meaning we must first read the ordinance just as if it were a transaction between two natural persons or between two corporations having power to make such a contract. Whether or not the city had such power is another question. But assuming, for the purpose of ascertaining the true meaning of the writing, capacity to contract, I think there was a contract with reference to the sale of tickets in packages of twenty-five within the rule of *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 24 Sup. Ct. 756; *Cleveland v. Cleveland E. R. Co.* 201 U. S. 529, 26 Sup. Ct. 513; *Detroit v. Detroit Citizens' St. R. Co.* 184 U. S. 368, 22 Sup. Ct. 410. All the identities of a contract existed: parties, stipulations in writing, consisting of the ordinance and written acceptance, a surrender of the privileges claimed or held by the railway company, and an assumption of a new definite obligation to be continued for a fixed period, and a provision that the former ordinances should be in force except as modified by these new stipulations. The city proposed by the ordinance that the railway company shall surrender its claim to charge a five-cent fare under each of its several existing ordinances on each of its lines and shall during the ensuing thirty-four years sell tickets in packages of twenty-five at the rate named and give transfer privileges to the holder of such tickets, and the railway company, by its written acceptance required in the ordinance, relinquishes its former right or claim and agrees to sell tickets at the specified

rates during the period mentioned. This, as regards that part of the ordinance in question, and aside from questions of its legality, is in form and substance a contract. Strict construction must nevertheless be fair and honest construction, and its chief office is in resolving ambiguities and cannot afford a justification for distorting the true meaning.

The constitution of this state contains the following:

Sec. 1, art. XI: "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage."

Art. 8 of sec. 1 of the North Carolina constitution of 1875 and art. 8 of sec. 1 of the New York constitution of 1894 are literal transcripts of the section of the Wisconsin constitution above quoted, and California (1880), Michigan (1850), Maryland (1891), Maine (1875), Washington (1889), Arkansas (1874), and other states have substantially similar constitutional provisions. Long before the enactment of ch. 313, Laws of 1860, and but six years after the adoption of our state constitution, the case of *Madison, W. & M. P. Co. v. Reynolds,* 3 Wis. 287, and the case of *Pratt v. Brown,* 3 Wis. 603, came before this court, and the scope and effect of sec. 1 of art. XI, *supra,* was discussed and declared. Again in 1861, in the case of *Nazro v. Merchants' Mut. Ins. Co.* 14 Wis. 295, this section was under consideration. It was in effect declared that all rights and franchises of a corporation are received, held, and exercised solely upon the faith of the sovereign grantor and during its pleasure. In 1870 the case of *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167, came before this court, and the question of reducing or regulating rates or tolls was discussed and decided, and the power to so regulate

was considered to exist under the quoted section of our constitution (pp. 198 *et seq.*). In 1874 the case of *West Wis. R. Co. v. Trempealeau Co.* 35 Wis. 257, affirmed 93 U. S. 595, was decided, and there, following *Tomlinson v. Jessup,* 15 Wall. 454, and quoting therefrom, this court said: "The reservation affects the entire relation between the state and corporation, and places under legislative control all rights, privileges, and immunities derived from its charter directly from the state."

In *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, statutes regulating rates of carriage by railways were upheld under the quoted section of our constitution. Both the last mentioned cases are referred to and followed in *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925. The latter case is in all essential respects like the instant case, and is authority for the proposition that where a corporation is organized under the general laws of this state and thereafter receives by ordinance from a municipality a grant of the right to use a highway for the purpose of operating its railway thereon, and this grant specifies the rate of fare to be charged, the state may later, acting through the *Railroad Commission,* establish a reasonable rate different from and higher than the rate specified in the franchise ordinance. This, as I understand it, is exactly in line with *Stanislaus Co. v. San Joaquin & K. R. I. & C. Co.* 192 U. S. 201, 24 Sup. Ct. 241. Considering a similar situation somewhat stronger in favor of the corporation, the United States supreme court there said:

"The authority given by the act of 1862 enabled the board of supervisors to conditionally regulate the rates. There is no promise made in the act that the legislature would not itself subsequently alter that authority. The state simply authorized its agents, the boards of supervisors, to regulate rates, but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be implied that the state might not thereafter authorize the

boards to reduce them, or that it might not itself do so directly."

Passing to the consideration of the reserved power as declared in the California constitution of 1849, which like our constitution spoke of the "formation" of corporations in these words: "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed," it was held, following *Tomlinson v. Jessup,* 15 Wall. 454, that the object was "to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. . . . The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state."

The franchise ordinance granted by the board of supervisors under delegated authority from the state was therefore considered a part of the corporate charter and as such subject to repeal or alteration. Agencies are created and contracts are made and construed with reference to existing laws. It is not to be presumed that the legislature, by the enactment of sec. 1862, Stats., intended to abrogate or suspend for a time its power of regulation or confer upon the municipal councils authority greater than that possessed by the legislature itself. Under the so-called reserved power in the constitution the legislature could not, in the conferring of corporate franchises or privileges, enact an irrepealable law. The state did not intend, therefore, that the municipality granting the use of the streets to a corporation organized under general laws should have power to do that which the legislature itself could not do. The cases of *City R. Co. v. Citizens' St. R. Co.* 166 U. S. 557, 17 Sup. Ct. 653; *Detroit v. Detroit Citizens' St.*

R. Co. 184 U. S. 368, 22 Sup. Ct. 410; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 24 Sup. Ct. 756; *Cleveland v. Cleveland E. R. Co.* 201 U. S. 529, 26 Sup. Ct. 513; and *Minneapolis v. Minneapolis St. R. Co.* 215 U. S. 417, 30 Sup. Ct. 118, have been brought to our attention, but they are not in point. As indicated in *Detroit v. Detroit Citizens' St. R. Co., supra,* at page 397, these were contests between the city and the carrier, and the state had not undertaken to assert its rights under the reserved power nor delegated to the city the authority to exercise the power of alteration or repeal. This power is by the constitution not reserved to the city, but to the state through its legislature. The laws in existence when and where a contract is made necessarily enter into and form part of the contract. *McCracken v. Hayward,* 2 How. (43 U. S.) 608; *State ex rel. Damman v. Comm'rs,* 4 Wis. 414; *Von Baumbach v. Bade,* 9 Wis. 559. The rates of common carriers, whether natural persons or corporations, were, when all these ordinances were enacted and accepted, subject to reasonable regulation by the state. That rule of law, as well as the existing and declared constitutional law of this state, must be read into the delegation of power contained in sec. 1862 and into each and every grant of the use of the streets made by the municipality pursuant to that section. Counsel contend for a narrow and technical construction of sec. 1, art. XI, Const.; in substance that the power to alter or repeal relates only to the right or franchise to exist as a corporation and does not include alteration or repeal of grants of power made by the state directly or through its delegate to an existing corporation. But this is contrary to nearly all the decided cases. This notion seems to have arisen from a curious perversion of what was decided in *Att'y Gen. v. Railroad Cos.* 35 Wis. 425. In that case it was argued by counsel for the railroad companies that ch. 273, Laws of 1874, classifying the roads and fixing rates, was a special act and therefore obnoxious to sub. 7 of sec. 31 of art. IV of our state

constitution, then lately adopted as an amendment. This provided that the legislature is prohibited from enacting any special or private law for granting corporate powers or privileges except to cities, while sec. 32 of the same article declared that the legislature shall provide general laws for the transaction of any business that may be prohibited by sec. 31 of this article, and all such laws shall be uniform in their operation throughout the state. This was a point of some difficulty because the statutes there in question had many of the earmarks of a special law, and because many corporate charters granted by special law were outstanding and in force and their provisions were various, and if the legislature could not alter one without altering all, or repeal one without repealing all, great confusion and injustice might result. To meet this argument the court said (p. 559):

"It was contended that this amendment, prohibiting the grant of corporate powers by special act, operates as a repeal of the reserved power of altering existing special charters by special acts; that the prohibition to grant corporate powers includes, not only the creation of new corporations, but also the grant of new powers to existing corporations and by inference the limitation or regulation of existing corporate powers, by special acts; and so confines the reserved power to alter special charters, to general laws.

"The difficulty of altering special charters by general laws, which shall be uniform throughout the state, is very apparent. And if this were the true construction of the amendment, it would almost follow that special charters could no longer be repealed by special acts, and that the whole reserved power was relegated to general laws. It was even said by counsel that the charter of a corporation, organized under general law, could be repealed only by repeal of the general law; so that one corporation of one kind could not be subjected to repeal without repealing the charters of all corporations of the same kind under the same general law. This is almost an argument *ad absurdum*. . . .

"We shall not stop to dwell here on the importance of the reserved power. . . . We shall only assume here that it is a

power of great significance and gravity; of such moment, that it is impossible to believe that the legislature and the people intended to surrender or impair it; very hard to believe that they suffered themselves to surrender or impair it by implication, in an amendment designed for quite a different purpose, quite consistent with the reserved power.

"But the purpose of the amendment, so far as it affects sec. 1, art. XI, appears to us very manifest. It was designed to act on the first clause only of the section, taking away the legislative discretion and changing the directory provision into a prohibitory one; and not to touch the second clause of the section at all, leaving the reserved power where it found it, to be exercised thereafter as theretofore, upon special charters, by special acts. . . .

"We can see nothing in the letter or spirit of the amendment to warrant us in giving it a construction to impair the reserved power. . . . And we feel bound to hold, and find no difficulty in holding, the phrase in the amendment, to grant corporate powers or privileges, to mean *in principio donationis,* and equivalent to the phrase, to grant corporate charters. This is implied not only by the word grant, but also by the word corporate. A franchise is not essentially corporate; and it is not the grant of franchise which is prohibited, but of corporate franchise; that is, as we understand it, franchise by act of incorporation."

What was said, therefore, is not in the nature of a limitation upon sec. 1, art. XI, but a limitation upon sub. 7, sec. 32, art. IV, of the constitution. The latter is limited so that it stands as a prohibition against the granting by special act of the franchise to exist as a corporation, but the former is unlimited and includes in its power of alteration and repeal all franchises of any kind which may at any period of its existence be conferred upon a corporation. And this has been the uniform application of sec. 1, art. XI. *West Wis. R. Co. v. Trempealeau Co.* 35 Wis. 257; *Whiting v. S. & F. du L. R. Co.* 25 Wis. 167; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *State ex rel. Cream City R. Co. v. Hilbert,* 72 Wis. 184, 39 N. W. 326.

In *State v. Railway Cos.* 128 Wis. 449, 108 N. W. 594, this subject is decided and discussed at pages 505 to 508, and it was ruled in that case that an act of the legislature long after the corporation was organized and existing, conferring additional privileges upon the corporation and not at all limited to its right to exist as a corporation, was within the power reserved by sec. 1, art. XI. A like ruling was made in *Black River Imp. Co. v. Holway,* 87 Wis. 584, 59 N. W. 126; in *State ex rel. Cream City R. Co. v. Hilbert, supra;* in the *Water Power Cases,* 148 Wis. 124, 134 N. W. 330; in the opinion of this court in *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530; in *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925; and in a great number of cases in the supreme court of the United States. It seems strange that the decision in *Att'y Gen. v. Railroad Cos., supra,* should be so carelessly read as to draw from it inferences limiting the reserved power of alteration or repeal contrary to what was there decided, and to apply the restrictions there applied to sub. 7 of sec. 32, art. IV, in order to prevent the latter from limiting the reserved power so as to limit the reserved power itself.

Upon these considerations and upon the words of sec. 1862 I come to the conclusion that no power was conferred upon the municipalities mentioned to make an unalterable or irrepealable contract with the corporations or persons there qualified to become grantees, and hence that the municipality did not do so. There is a contract, but subject to alteration by the state in respect to rates. The *Railroad Commission* was acting within its powers in making the order in question so long as the order is not confiscatory in character. I may add that in this state corporations, while subject to this reserved power, are fully protected against spoliation, confiscation of property, or even injustice by the Fourteenth amendment to the federal constitution and the equivalent provisions in our state constitution. *Water Power Cases,* 148 Wis. 124,

134 N. W. 330. The natural persons behind the corporation, the shareholders, may be, under our constitution, deprived of any or all corporate powers or privileges, but not of the other acquired property of the corporation or of the use of such property in such manner as is lawful for natural and unprivileged persons. This property they may continue to enjoy as tenants in common, or they may, like other natural persons, incorporate under the general incorporation acts open to all. Thus, while the authority of the state is vindicated and its grants of power or privilege withdrawn or altered, none of the evils which the rule of the leading case in the federal supreme court was intended to guard against are possible under our system.

The following opinion was filed June 9, 1913:

MARSHALL, J. (*dissenting*). I have to dissent upon the ground that the result violates the prohibition against taking private property without rendering just compensation therefor and the impairment of contract obligations.

If there is a question firmly settled in this court, notwithstanding doubt is somewhat cast upon it by expressions in opinions, it is that an unconditional legislative privilege, not corporate, granted and accepted, is property which may be bought and sold like any other property, and can no more be taken away for public purposes without tendering just compensation therefor than any other thing of value. The confusion which found place in our opinions after *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 460, between such a privilege and an act of incorporation was eliminated by *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 83 N. W. 697, followed by *Pittsburg T. Lab. v. Milwaukee E. R. & L. Co.* 110 Wis. 633, 643, 86 N. W. 592; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 498, 83 N. W. 851; *In re*

Southern Wis. P. Co. 140 Wis. 245, 258, 122 N. W. 801; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 420, 130 N. W. 530; *Calumet S. Co. v. Chilton,* 148 Wis. 334, 370, 135 N. W. 131.

The suggestion sometimes made that a legislative privilege, not corporate, is within sec. 31, art. IV, of the constitution and within the reserve power of sec. 1, art. XI, relating to corporations, I am utterly unable to understand. Sec. 1, art. XI, does not deal at all with mere legislative privileges, but does deal with the creation of corporations and defining their powers. A grant thereunder is not inherently assignable. No constitutional regulation of power to grant mere privileges, not corporate, was ever supposed to be necessary. It has been common, from time immemorial, for sovereign authority to make such grants. It was with a new manner of granting corporate powers that sec. 31, art. IV, dealt. The term there "for granting corporate powers or privileges, except to cities" refers to the words "corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act except for municipal purposes," in sec. 1, art. XI. The purpose of the latter section was to prevent the formation of mere private corporations by special act, except in special cases, while the amendment to sec. 31, art. IV, entirely prohibited the formation of such corporations except under the general law. Both sections deal with the same thing—the granting of privileges by act of incorporation, and not privileges which may be granted irrespective of any constitutional provision as was distinctly decided in *In re Southern Wis. P. Co., supra.*

So the question of whether the grant of a mere privilege, not corporate, is subject to alteration or repeal is to be solved by the terms of the grant, construed in the light of characterizing circumstances, not by any constitutional provision. It has been so repeatedly held here. *Chapin v. Crusen,* 31 Wis.

209; *Wright v. Milwaukee E. R. & L. Co.* 95 Wis. 29, 69 N. W. 791. It will be seen by these cases that whether any change in such a franchise as we have here, is legitimate, is referable solely to the terms of the grant. True, the court failed to distinguish, as it did later, between a franchise and a corporate franchise. But reading that distinction into the opinions they clearly hold that such a franchise, whether granted to a person or a corporation, is not subject to change except according to its terms, and such is the law necessarily.

We do not overlook the fact that in *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925, the court, *arguendo,* spoke of a franchise owned by a corporation, as a corporate franchise, and so under the reserve power; but I think that was unnecessary to the case and the merest inadvertence. It is clearly contrary to *In re Southern Wis. P. Co.* and all the other cited cases. It requires but a moment's reflection to appreciate that if such a privilege is really corporate and so within the reserve power, it cannot be granted to a corporation by special act at all,—the very question at issue in the *Southern Wis. P. Co. Case.* There the contrary in *Stevens Point B. Co. v. Reilly,* 44 Wis. 295, was overruled, and the logic of *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 83 N. W. 697, and *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851, followed.

It is unfortunate that after all efforts made to distinguish between a franchise and a corporate franchise, the former governed by the terms of the grant and the latter by the constitutional reservation, confusion keeps cropping out, now and then, and even passes unnoticed for a time by those who have to deal specially in respect to it. I take a measure of this to myself, though I endeavored, with the concurrence of some of my brethren to whom I submitted the matter, to correct my inadvertence at the earliest possible moment. *Calumet S. Co. v. Chilton,* 148 Wis. 334, 370, 135 N. W. 131. I think all

said in the *Manitowoc Case* about a privilege under sec. 1862 of the Statutes being a corporate franchise subject to the constitutional right of alienation or repeal, is beside the case.

In this case there was a corporation in operation. The privilege was in no sense a corporate privilege. The opinion of the court practically concedes that. I am led to say what I have respecting the legislative power because the subject was advanced in this case and found some favor. However, the decision goes wholly on a construction of the statute. The idea is that, by a proper construction thereof, the right to regulate the charge for fares was not parted with by the legislature. I cannot agree with that.

It is conceded that it was competent for the state to make a bargain with the railway company as to the rate of fare to be charged and that such a bargain under legislative authority is within the constitutional guaranty against impairment, the same as one between private parties. The federal supreme court has spoken very decisively on that subject many times, particularly in *Detroit v. Detroit Citizens' St. R. Co.* 184 U. S. 368, 22 Sup. Ct. 410, and *Minneapolis v. Minneapolis St. R. Co.* 215 U. S. 417, 30 Sup. Ct. 118.

There was no constitutional prohibition in the way of the city of Milwaukee, by legislative authorization, bargaining with the street railway company as it is claimed to have done. That it possessed such authority in very plain language cannot well be gainsaid. What could be plainer than sec. 1862: "Any municipal corporation . . . may grant to any such corporation . . . upon such terms as the proper authorities shall determine, [the use] of any streets," etc.? What could be plainer, *inter partes,* in ordinary matters? Who would be bold enough to contend that the legislative intent was not to afford opportunity to make a contract so that a railway company could safely finance its operations? Such certainly is as important to the public as to the railway company. The

uncertainty, in the experience of any street railway company as to whether it has anything which it can really count on, forms a large element of expense in many ways, which, in the end, has to be charged up to the investment and liquidated in the charges for service. The idea that the public really gains any advantage by holding over an investment in such property the disturbing uncertainty, is a great mistake. The best way to get the best of service at the lowest obtainable price is to remove just as far as possible, all dangers to the reasonable income paying quality of the investment.

Now conceding, as must be done, in view of the constitution and decisions here and in the federal supreme court, that the city of Milwaukee had authority by contract to confer upon the railway company authority to charge whatever fare it might see fit, up to a specified limit, was such contract made? That the adversary parties came together to make a contract, goes without saying, as it does that the dominant mutual idea was an exchange of equivalents. The railroad company surrendered certain things and incurred certain obligations on its side. The city in return promised the railway company enjoyment of a contract right to charge for fare, "not exceeding five cents," except for children, etc., the right to one transfer to be incident to each ticket and opportunity to be offered to patrons to purchase "tickets in packages of twenty-five for one dollar, or six for twenty-five cents," usable at certain times and within certain limits. Now that seems to me to be plain. Language which is plain from every viewpoint, does not admit of judicial construction. The mutual agreement that the company may charge specified rates for service, seems by necessary inference, to mean that at its option it may charge up to the maximum. If that were not the intention of the parties, what were they contracting for? The principal thing was matter of fare. All else depended on that. Would a company leave that to be changed at the

pleasure of the municipality, when it was the very foundation element of competency to economically finance its operation? It having relied thereon, and arranged all its financial matters accordingly, and investors having taken its securities in the same reliance, should the plain language of the contract between the parties be twisted out of the natural, ordinary meaning in the interests of municipal control?

There is much which might be written on this matter, but there is no good which can come from my doing so. I have assumed the cause would be removed to the federal supreme court, as it seems to me to be in conflict with the federal decisions. True, the court rests the matter on the construction of the statute, but if the construction is unreasonable from the standpoint of the decisions of the federal supreme court under substantially the same circumstances, as in my judgment it is, there can be no escape by means of statutory construction from the effect of violation of the constitutional guaranties. If that were not so, a very easy way would exist of violating such guaranties and defying the supreme judicial authority in respect to the matter.

I appreciate there is no purpose on the part of my brethren to circumvent the constitution. They have reached a conclusion as to the meaning of the statute which renders *Detroit v. Detroit Citizens' St. R. Co.* 184 U. S. 368, 22 Sup. Ct. 410, inapplicable. That is all there is to it. They have reached that conclusion by applying, in my judgment, the doctrine of *Chapin v. Crusen,* 31 Wis. 209, and similar cases away beyond their legitimate limits. After resolving all reasonable doubts in favor of the municipality, it yet seems clear to me that the very thing the street railway company, and the common council of the city as well, were after was settlement for a long period of the vexed question of fares. The records show, and it is a matter of public knowledge, that disputes as to fares for years have been

causing a very disturbed condition of affairs in Milwaukee. It had entered into the political activities of the city as no other question had, and doubtless rendered the future of the corporation so uncertain as to almost paralyze it as regards making advantageous arrangements for rehabilitation and extensions. The only thing to bring peace between the people and the corporation and enable the latter to perform its public duties in the most advantageous way to the public, was to stop, absolutely, for the length of time covered by the ordinance, the disputes over whether the rates of fare were reasonable or not. How can it be fairly said that the really prominent thing which led to the arrangement, sought to be disturbed by the rate commission under its assumption of authority, was not done at all?

Where did the *Railroad Commission* get its authority to supersede the contract? I appreciate the answer of the court's opinion is that it has not attempted to supersede a contract, but to enforce its terms; that, *not to exceed the ordinance limit as to fares,* left the field of activity to which the *Commission* succeeded as to what is a reasonable fare; that the meaning of the contract is the railway company shall be privileged to charge a reasonable fare not exceeding the stated rate. That comes back to the question of construction and concedes that if the construction be wrong the decision is wrong. It is appreciated that the law under which the *Railroad Commission* operated expressly reserved from the grant of administrative power, power to interfere with existing contracts which were not inherent in the corporate franchise. So if there was a contract, exempt from legislative interference, fixing the rate of fare as to the railway company, the *Railroad Commission* usurped authority in making the order complained of. If there was a contract which left the question open to investigation as to what was the reasonable fare it could charge, leaving the ascertainment of that a matter of

administration, then the *Commission* acted within the scope of its power. I think the former is correct.

VINJE, J. I concur in the foregoing opinion of Mr. Justice MARSHALL.

BARNES, J., took no part.

GRAY, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

April 30—May 31, 1913.

Railroads: Injury to employee in yards: Negligence of engineer: Violation of orders: Scope of employment: Contributory negligence: Questions for jury: Federal Employers' Liability Act: Injury to employee when not employed in interstate commerce: Evidence: Judicial notice: Offer of proof: Appeal: Error not presumed: Damages: Tuberculosis induced by injuries: Medical testimony.

1. Plaintiff, who was employed in defendant's yards as engine "dispatcher" or "hostler," was walking in a beaten path at the side of the track northward from a cinder pit into which another employee was throwing water from a hose, causing a cloud of steam to rise and spread over the track in the direction plaintiff was going. Wishing to cross the track, he stopped and listened and, hearing no sound but a hissing noise which he thought was produced by the throwing of water on the hot cinders, stepped on the track without looking toward the south and was struck by a "drifting" engine coming from that direction. *Held* that, in view of the facts that there was a yard regulation requiring the stopping of all engines south of the cinder pit, which the engineer failed to observe, and that the duties of yardmen necessarily take them frequently upon and about the tracks, it cannot be said as a matter of law that plaintiff was guilty of contributory negligence, although upon the same evidence the jury would have been warranted in finding that to be the fact.

2. Under the circumstances stated, plaintiff's testimony that he listened but could not hear the natural and necessary noises of the engine as it approached, was not incredible.
3. Although the engineer of the engine which struck plaintiff violated the orders of his employer in running past the cinder pit instead of delivering his engine to the engine dispatcher south of the pit, he was nevertheless within the scope of his employment so far as third persons were concerned.
4. That the great railroad systems of the state are continuously engaged in both interstate and intrastate commerce is matter of common knowledge.
5. To bring a case within the federal Employers' Liability Act it is necessary not only that the employer be engaged in interstate commerce but that the injured employee shall suffer his injury while he is employed therein.
6. An employee whose duty it is to care for and dispatch engines used in both interstate and intrastate commerce cannot be said to be employed in interstate commerce during the entire day; especially not during the periods of leisure or rest, while merely waiting for the arrival of an engine.
7. To warrant a reversal for the exclusion of evidence offered for the purpose of showing the case to be within the federal act, where plaintiff's injury occurred during a period of leisure or rest, the offer should be so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish that plaintiff's entire work was connected with interstate commerce.
8. Medical testimony, in a personal injury case, to the effect that an injury such as plaintiff received is likely to induce or incite tuberculosis by reducing the natural resistance of the patient, does not suffice to establish a causal relation between the physical injury and tuberculosis shown to have existed more than a year later.
9. But when to this testimony is added the positive opinion of plaintiff's family physician, who was in a position to judge of the actual as well as probable effects of the injury upon plaintiff, to the effect that the tubercular condition is the result of the injury, it cannot be said that a finding of the existence of such causal relation is purely conjectural.

APPEAL from a judgment of the municipal court of Outagamie county: THOMAS H. RYAN, Judge. *Affirmed.*

Personal injuries. Plaintiff, a man fifty-one years of

age, was for years an employee of the defendant, and in January, 1911, was an "engine dispatcher" or "hostler" in the defendant's yards at Antigo, Wisconsin. His duties were to take charge of every engine coming into the yards at the close of its run, empty the fire box by dumping the coal and cinders into the cinder pit, run it to the coal house to be replenished with coal, to the water tank to be replenished with water, thence to the wood bin to be supplied with kindling to start a fire, and thence to the roundhouse to wait for its next trip. He had an an assistant named Rock and a helper named Kraioski. The latter was called the pitman, and it was his duty to clean out the pan of the engine, wet down the coals and cinders, and shovel the cinders out of the pit. The tracks in the yards run practically north and south, the roundhouse being at the north end and the engines coming in at the south end. As the engine comes in to the yard it first reaches the cinder pit, a long, rectangular pit, several feet deep, which is about eighty feet in length, somewhat wider than the track and immediately under the same. Six feet nine inches north of this pit and on the west side of the track is a coal shed, which parallels the track for about 250 feet northward, and is four feet three inches distant from the west rail thereof, leaving a clearance space of about eighteen inches. On the east side of the track, about twelve feet distant from the east rail and about sixty feet north of the cinder pit, is a small shelter shanty, nine by fifteen feet in size, in which the plaintiff and his helpers stayed when not required by their duties to be actively at work. The sandhouse, water tank, and wood bin were still further north on the east side of the track, and the roundhouse was 200 feet further north than the wood bin. About thirty engines were dispatched during the twenty-four hours, of which the plaintiff and his assistant dispatched about half. Their working hours were from 6 o'clock a. m. until 6 o'clock p. m.

The accident in question happened between 10 and 11 o'clock in the forenoon of January 19, 1911. The plaintiff testified that on that morning he and his helper had dispatched four engines prior to 8:20 o'clock, at which time he went to the depot to get his pay check. He then went to a grocery store and also to a saloon near by, and returned to the roundhouse after an absence of about fifty minutes. He remained at or in the vicinity of the roundhouse about three quarters of an hour and then walked southward on the east side of the track past the sandhouse and the shanty to a point about twenty-three feet south of the shanty, where he crossed to the west side of the track and walked along south along the east side of the coal shed, between it and the west rail of the track, to the southeast corner of the coal shed, and continued south to a point three or four feet south of the north line of the cinder pit, where he stopped. He testifies that he came to this point because when he left the roundhouse he saw so much steam and smoke arising from the cinder pit that he concluded that he ought to ascertain whether the cinder-pit man, Kraioski, was performing his duty in putting out the fire in the cinder pit. He further testifies that when he reached the last point above stated he saw Kraioski standing at the west edge of the cinder pit with the hose in his hands, throwing water on the hot cinders in the pit, and that when he saw this he started back to the shanty along a beaten path between the coal shed and the west rail; that smoke and steam were coming from the cinder pit in volumes and were blown northward so as to obscure the vision; that as he reached a point about opposite the shanty, as he thought, he turned eastward, stopped and listened a few seconds, but heard nothing, as he thought, except the sizzling of the water on the cinders and hot coals in the cinder pit, and then started to step over the west rail of the track, and was struck by engine No. 1066 and badly injured. He claimed that the engine was drifting or approaching noiselessly without working steam and without ringing

the bell. The fact that he was struck by the engine is admitted. The negligence claimed was (1) the failure to stop the engine south of the cinder pit, in violation of a regulation or order claimed to exist to that effect; (2) the failure to ring the engine bell; and (3) the running of the engine at a negligent rate of speed under the circumstances.

The jury returned the following special verdict:

"(1) Was the plaintiff, on the 19th day of January, 1911, struck by one of defendant's engines and injured? *A.* Yes (by the court).

"(2) Did the defendant, prior to the day of the plaintiff's injury, cause an order to be issued providing in substance that engines delivered on coal-shed track to be dispatched, should stop south of the cinder pit? *A.* Yes.

"(3) If you answer question numbered 2 'Yes,' was such order abrogated prior to the day of the plaintiff's injury? *A.* No.

"(4) If you answer question numbered 2 'Yes' and question numbered 3 'No,' then was Engineer Kane guilty of negligence in running his engine north of the cinder pit in violation of such order at the time plaintiff was injured? *A.* Yes.

"(5) If you answer question numbered 4 'Yes,' then was such negligence of Engineer Kane a proximate cause of plaintiff's injury? *A.* Yes.

"(6) Was the engine bell of the engine that struck plaintiff ringing at and immediately prior to the time of plaintiff's injury? *A.* No.

"(7) If you answer question numbered 6 'No,' then was Engineer Kane guilty of negligence in failing to cause the engine bell to be rung immediately prior to the time of plaintiff's injury? *A.* Yes.

"(8) If you answer question numbered 7 'Yes,' then was such negligence a proximate cause of plaintiff's injury? *A.* Yes.

"(9) Under the circumstances existing, was Engineer Kane guilty of negligence in running the said engine north of said cinder pit to the place where it struck plaintiff at the rate of speed at which he was running? *A.* Yes.

"(10) If you should answer question numbered 9 'Yes,'

then answer this: Was such negligence a proximate cause of plaintiff's injury? *A.* Yes.

"(11) Was the plaintiff guilty of any negligence which proximately contributed to his injury? *A.* No.

"(12) If you should answer the eleventh question 'Yes,' then answer this: Was the said negligence of Kane greater than that of the plaintiff? *A.* (No answer.)

"(13) If you should answer the twelfth question 'Yes,' then did such negligence contribute in a greater degree to the plaintiff's injury than did that of the plaintiff? *A.* (No answer.)

"(14) What sum will justly compensate the plaintiff for the injuries sustained by him? *A.* $7,815 (seven thousand eight hundred and fifteen dollars)."

The usual motions were made by the defendant for judgment notwithstanding the verdict, for correction of the verdict and judgment thereon as corrected, and, in event of the denial of these motions, for a new trial. All of the motions being overruled, judgment was rendered for the plaintiff on the verdict, and the defendant appeals.

For the appellant there was a brief by *Edward M. Smart,* and oral argument by *C. H. Gorman.* He contended in part: (1) The plaintiff was guilty of contributory negligence as a matter of law (*Osborne v. Lehigh Valley C. Co.* 97 Wis. 27, 71 N. W. 814); and the question as to whose negligence was the greater should have been submitted to the jury (*Schendel v. C. & N. W. R. Co.* 147 Wis. 441, 133 N. W. 830). (2) The acts of the engineer were not in the discharge of his duties and the defendant is not liable therefor. Laws of 1907, ch. 254; *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276; *Steffen v. McNaughton,* 142 Wis. 49, 124 N. W. 1016; *Firemen's Fund Ins. Co. v. Schreiber,* 150 Wis. 42, 135 N. W. 507. (3) The plaintiff was employed in interstate commerce and the federal act governs the case. *Second Employers' Liability Cases,* 223 U. S. 1, 32 Sup. Ct. 169; *Ruck v. C., M. & St. P. R. Co., ante,* p. 158, 140 N. W.

1074; *Lamphere v. Oregon R. & N. Co.* 196 Fed. 336; *Zikos v. Oregon R. & N. Co.* 179 Fed. 893; *Colasurdo v. Central R. Co. of N. J.* 180 Fed. 832, 192 Fed. 901; *Behrens v. Ill. Cent. R. Co.* 192 Fed. 581; *Mikkelson v. Truesdale,* 63 Minn. 137, 65 N. W. 260. (4) The evidence as to tuberculosis was too remote. *Bucher v. Wis. Cent. R. Co.* 139 Wis. 597, 120 N. W. 518; *Krawiecki v. Kieckhefer B. Co.* 151 Wis. 176, 138 N. W. 710; *Depow v. C. & N. W. R. Co.* 151 Wis. 109, 138 N. W. 42; *Weber v. Third Ave. R. Co.* 12 App. Div. 512, 42 N. Y. Supp. 789; *Hoey v. Metropolitan St. R. Co.* 65 App. Div. 270, 74 N. Y. Supp. 1113; *Scheffer v. Railroad Co.* 105 U. S. 249; *Marcott v. M., St. P. & S. S. M. R. Co.* 147 Wis. 216, 133 N. W. 37; *Spear v. Hiles,* 67 Wis. 361, 30 N. W. 511; *Watters v. Waterloo,* 126 Iowa, 199, 101 N. W. 871; *Snow v. N. Y., N. H. & H. R. Co.* 185 Mass. 321, 70 N. E. 205; *Koch v. Zimmerman,* 85 App. Div. 370, 83 N. Y. Supp. 339.

Stephen J. McMahon, attorney, and *P. H. Martin,* of counsel, for the respondent.

WINSLOW, C. J. The appellant makes five contentions, viz.: (1) that the plaintiff was guilty of contributory negligence as matter of law; (2) that the engineer of the engine was not acting within the scope of his employment when the accident happened; (3) that the court erred in refusing to receive evidence tending to show that plaintiff was employed in interstate commerce at the time of his injury; (4) that the court erred in admitting in evidence proof as to pulmonary tuberculosis, and in failing to instruct the jury that there was no evidence that the accident caused his tubercular condition; and (5) that the damages are excessive. These contentions will be discussed in their order.

1. The first contention is based principally upon the plaintiff's own admissions to the effect that he did not look to the

south to see whether an engine was coming before he started to walk northward, that he knew it was dangerous to walk northward from the pit, either on the track or close to the track, because it was a common occurrence for an engine to move along over this space without giving the proper signals, and that notwithstanding this fact and the fact that he could not see to the southward he started to cross the track. In addition to these admissions the defendant insists that the plaintiff's claim that he listened and could not hear the natural and necessary noises of the engine as it approached is incredible.

These considerations were certainly amply sufficient to justify the jury in holding the plaintiff guilty of contributory negligence, but the question whether they would justify the court in so holding is a very different one. The plaintiff's testimony went further, however. He testified (and in this he is fully corroborated by other testimony) that a yard regulation existed requiring incoming engineers to stop their engines and leave them for the "engine dispatchers" to take charge of before reaching the cinder pit; that as he walked northward he walked west of the track in a beaten path and not on the track itself; that he stopped before attempting to cross the track and while he was still in a place of safety (namely, the clearance space between the track and the coal shed), and listened for somewhere from two to four or five seconds; that he heard no engine nor engine bell; that the only sound he could hear was a hissing noise which he thought was the noise produced by the throwing of water on the hot cinders in the pit, that he concluded that everything was clear, and then started to step across the track.

We are unable to say that this testimony is incredible. We suppose it is matter of common knowledge that a "drifting" engine frequently makes little noise. It may well be that under circumstances such as were testified to here, the noise of the relief valve of such an engine might be so

merged into the hissing of the water being thrown upon the cinders as to be indistinguishable. Taking into consideration the fact that there was a yard regulation requiring the stopping of all engines south of the pit and the further fact that yard men must necessarily be frequently upon and about the tracks in the performance of their duties, we are unable to say that the plaintiff's conduct here was negligent as matter of law.

2. The engineer of the locomotive testified that he knew of the bulletin requiring engines to stop south of the pit to be delivered to the "engine dispatcher," but that he took his engine north to save himself walking; that he had to go to the roundhouse to leave his clothes, and that he always took his engine north as far as the water tank if there were no engines there, and the "engine dispatcher" received it at that place. From these facts it is argued that the engineer was not only disobeying orders, but was not within the scope of his employment, hence that his master is not responsible for his negligent act. The contention is clearly untenable. The engineer's duty was to deliver his engine to the "engine dispatcher." He was directed to do that at a certain place, but he chose to do it at another place. In so doing he violated orders, but was still within the scope of his employment. This subject has been gone over so recently that it is unnecessary to enlarge on it again. The principle is that if a servant is endeavoring to forward his master's business, but is guilty of negligence or even violation of orders in his endeavor, he will violate his duty to his master, but he will still be within the scope of his employment so far as third persons are concerned. Were it otherwise there would apparently be no redress against the master for injuries received by third persons at the hands of negligent or disobedient servants. *Ratcliffe v. C., M. & St. P. R. Co., ante,* p. 281, 141 N. W. 229.

3. The complaint does not allege that the defendant was

engaged in interstate commerce, or that the engine in question had been handling an interstate train, but simply that the defendant was operating trains and was carrying passengers and freight for hire between Antigo and other cities and villages in Wisconsin. Neither did the plaintiff's evidence show that the defendant was transacting an interstate business. When the defendant took the case, however, it offered to show that it and its trains, engines, and employees were engaged in hauling cars of freight continuously over this line between points in Illinois, Michigan, and Wisconsin at and prior to the time of the accident; that the engines which were being dispatched at this roundhouse at the time in question were making trips through Michigan to Ashland, making connections with the Watersmeet branch; that the engines running south wouldn't run outside the state; that those going and coming from the south handled refrigerator cars from Chicago. No offer was made to show that the engine in question had been hauling an interstate train or interstate freight, nor that all the engines dispatched at this roundhouse hauled interstate freight or interstate trains. Part of this testimony was received against objection, but ultimately it was all stricken out, and so the question whether the federal Employers' Liability Act controlled the present case was eliminated from the case.

An attempt is made by the respondent to justify this ruling on the ground that the testimony was incompetent and immaterial, because there is no claim made in the answer that the plaintiff was employed in interstate commerce at the time of his injury. We should be slow to hold to so strict and technical a rule. The statutes of the United States are the law of the land, and not like the statutes of our sister states which must be pleaded and proven in order to be available. Furthermore, the fact that the great railroad systems of the state are continuously engaged in both kinds of com-

merce must, we think, be so well known as to be matter of common knowledge. We do not find it necessary to decide this question, however, as we are of opinion that the ruling was right on the merits. As it was pointed out in the recent case of *Ruck v. C., M. & St. P. R. Co., ante,* p. 158, 140 N. W. 1074, it is necessary, in order to bring a case within the federal act, not only that the employer be engaged in interstate commerce, but that the injured employee shall suffer his injury "while he is employed" in interstate commerce. Taking care of an engine after it has completed its run and preparing it for the roundhouse seems very like repairing it, and we have just held that a servant is not employed in interstate commerce who is simply repairing an appliance which may be used for either kind of commerce, but which is not at the time of the repair in actual use in facilitating interstate commerce. *Ruck v. C., M. & St. P. R. Co., supra.*

We think there is a stronger ground, however, upon which the ruling of the trial court may be sustained. It appears that the plaintiff at the time of the accident here was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. Now it may perhaps be correctly held (though we do not decide the question) that a man whose day is spent in dispatching engines all of which are engaged in interstate commerce is in legal effect employed in interstate commerce during the whole day and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; but if, on the other hand, part of the engines dispatched be engaged in interstate business and part in local or intrastate business, we are unable to see how it could be logically said that he was "employed in interstate commerce" all day or during his intervals of leisure. In the present case, as we have seen, there was no offer to show that all the engines dispatched daily by

the plaintiff were engaged in interstate commerce. As said before in this opinion, we think it must be considered a matter of common knowledge that the great railroad systems of the present day are engaged in both interstate and intrastate commerce all the time and side by side. The offer of proof in this case went little, if any, further than this. It was noticeably guarded and indefinite in its purport. Every word of it might be admitted to be true and yet it would not be shown that all the engines dispatched at this roundhouse by the plaintiff were engaged in interstate business, nor even that the engine in question had been so engaged. The offer should have been so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish the fact that the plaintiff's entire work consisted of the dispatching of engines engaged in interstate commerce. Error must appear affirmatively,—it is not to be presumed. We conclude, therefore, that there was no error in these rulings.

4. It appears from the evidence that the plaintiff received severe bruises, wounds, and contusions on the head, body, and hips at the time of the accident; that several ribs were broken, and that he was in bed two weeks; that his left arm is still partially paralyzed; that he suffers pain in the left arm and shoulder practically all the time; that he is incapacitated for physical labor; is afflicted with occasional spells of dizziness; and that his average weight is reduced from about 160 pounds to about 130 pounds. The injury was suffered in January, 1911. He was examined by Dr. Connell of Fond du Lac in May, 1912, and it was then found for the first time by examination of his sputum that he had incipient consumption or tuberculosis of the lungs. He testified himself that he had had night sweats and hemorrhages. This testimony was received against objection, and the court refused to instruct the jury, as requested by the defendant, that they could not find that the accident caused the pulmonary tuberculosis

from which the plaintiff is suffering. The defendant's contention is that there is no sufficient evidence to establish any causal relation between the physical injury and the tuberculosis which existed more than a year later, and that the relationship between the two is purely conjectural. There was medical testimony to the effect that an injury such as plaintiff received is likely to induce or incite tuberculosis by reducing the natural resistance of the patient, lowering his vitality, and putting him in a condition whereby he is unable to withstand infection. If this testimony were the only testimony tending to show a causal relation between the injury and the tuberculosis we should agree with the defendant's contention. If decreased powers of resistance resulting from an injury are to be considered as a link in the chain of causation between the injury and a disease developing years afterward, it is very evident that a large, if not an almost limitless, field is opened up for speculation by juries in a region where there can be no guide and no probability of just results.

In the present case, however, there was other testimony besides the general testimony above referred to. Dr. E. J. Donohue, who treated the plaintiff for his injuries from the day of the accident in January, 1911, until some time in April following and gave him a thorough physical examination, including an examination of the sputum, about two weeks before the trial in July, 1912, testified directly as follows:

"Such an injury as the one he sustained would cause tuberculosis. It would decrease the resisting forces, tend to give a chance for infection, and give it a chance to loom up. In other words, this germ that is dormant or inactive would or can become active. In my opinion the tubercular condition that I found is the result of this injury, and he is permanently disabled from manual labor."

Here is direct testimony by the physician who treated the plaintiff for his injuries for months, and presumably knew

more of their nature and extent than any one else. It appears that he had known the plaintiff for years and had treated his family. He must have been in a favorable position to judge of the actual as well as the probable effects of such an injury upon the plaintiff. He testified positively that in his opinion the tubercular condition was the result of the injury received. We are unable to say that this testimony is beyond the proper scope of expert medical testimony, and unless we can say that it seems certain that we cannot hold that a finding that the tubercular condition was caused by the accident is purely conjectural.

There are no other contentions which require treatment.

By the Court.—Judgment affirmed.

STATE EX REL. CITY OF SUPERIOR, Respondent, vs. DULUTH STREET RAILWAY COMPANY, Appellant.

April 30—May 31, 1913.

***Railroad commission: Public utilities: Street railways: Strikes: Compelling adequate service: Jurisdiction of courts:* Mandamus.**

The legislature having clothed the railroad commission with full authority to act *quasi*-judicially in a case where a public utility corporation (in this instance a street railway company) has been rendered incapable of performing its public duty without submitting to such terms as its employees, acting in combination, may prescribe, and where, on behalf of the public, the furnishing of adequate service by such corporation is sought to be compelled,—and a judicial review of the determination of the commission having been provided for,—the courts should not, unless in an extraordinary emergency, interfere in the first instance by their coercive authority, but should leave the parties to their remedy before the commission.

APPEAL from a judgment of the superior court of Douglas county: JAMES WICKHAM, Judge. *Reversed.*

Mandamus proceeding to compel defendant to "immediately operate a sufficient number of cars, with reasonably efficient operators, and in such manner, over all its lines within the city of *Superior* as will give the public adequate street-car service equal to that given immediately prior to September 12, 1912, and that it operate its cars with such employees and in such manner as to avoid inciting the public to acts of violence," or show cause to the contrary.

Such was the mandate in an alternative writ of *mandamus* issued out of the superior court of Douglas county and served on defendant, based on a petition to this effect, leaving out the introductory matters showing appellant to owe the ordinary duty of a public utility street railway company to relator of affording reasonably adequate street-car service therein over its lines.

September 12, 1912, the railway company performed its duty as a public utility railway corporation in the city of *Superior* by affording reasonably adequate service over its lines in said city in the transportation of all persons desiring such service; but not thereafter. Its management has been hostile to its employees combining, having representative committees, and presenting grievances through such committees to the company, thus deterring them from doing so for fear of being discharged. The employees of the company on the Duluth part of the system, about September 9th, organized a union for the purpose aforesaid, by reason whereof several of the prominent of them in the matter, were summarily discharged. For such treatment all operators on such part quit work and then a condition of lawlessness and rioting commenced because of the company trying to operate with new men and efforts of the old employees and their sympathizers to prevent it; causing danger to life and property. The company then insisted upon its operators on through cars over the Duluth-Superior line, making the entire course, and be-

cause thereof and of its general hostility to acting of employees as a union, those in *Superior* struck and the conditions existing in Duluth were, in a large measure, duplicated in *Superior;* the strife and violent conditions being general as to the whole system. The *Superior* city employees are willing to resume work in operating cars therein, but not in Duluth while the strike is on there. September 15th, they so offered to return and the offer was refused. They are willing to so return now, at their former wages, under the further condition of being recognized as a union, permitted to act through committees in dealing with the company, and of there being no discrimination against any employee because of his belonging to the union. The company nevertheless refuses to take back its old employees except upon its own terms and without any assurance for the future. As good service as was formerly afforded is vitally necessary to the people of *Superior,* whereas the company is affording very inadequate service, operating a few cars at irregular intervals and by new and inexperienced operators, and refusing to operate a sufficient number of cars or employ efficient operators for those in service, or to deal on a reasonable basis with its old employees to the great prejudice of the people of the city of *Superior.* The attitude and conduct of the company has caused such condition as to imperil the public peace, rendering it difficult, and at times impossible, to maintain order in the city. If such company will desist from such course, resumption of adequate service in *Superior* can be readily accomplished, but failure to do so will result in a continuation of the condition of lawlessness to the detriment of the lives, health, and welfare of the people of the city.

In due course, appellant moved the court to quash the writ and demurred thereto for insufficiency. The motion and demurrer were overruled. This appeal is from the order closing the matter.

For the appellant there was a brief signed by *W. R. Foley,* attorney, and *L. K. Luse,* of counsel, and oral argument by *Mr. Luse.*

For the respondent the cause was submitted on the brief of *H. V. Gard* and *T. L. McIntosh.* They contended, *inter alia,* that where a duty is imposed upon a corporation by law (including ordinances), courts will enforce it by *mandamus. State ex rel. Wis. T. Co. v. Janesville St. R. Co.* 87 Wis. 72, 57 N. W. 970; *State ex rel. Milwaukee v. Milwaukee E. R. & L. Co.* 144 Wis. 386, 129 N. W. 623; *State ex rel. Grady v. C., M. & N. R. Co.* 79 Wis. 259, 48 N. W. 243; *Loader v. B. H. R. Co.* 14 Misc. 208, 35 N. Y. Supp. 996; *Loader v. A. A. R. Co.* 14 Misc. 208, 35 N. Y. Supp. 999; *People v. N. Y. C. & H. R. R. Co.* 28 Hun, 543; *State ex rel. Ellis v. A. C. L. R. Co.* 53 Fla. 650, 44 South. 213, 12 Am. & Eng. Ann. Cas. 359–370, 13 L. R. A. N. S. 320; *Union Pac. R. Co. v. Hall,* 91 U. S. 343; *Potwin Place v. Topeka R. Co.* 51 Kan. 609, 33 Pac. 309.

MARSHALL, J. The appeal raises the very grave question of whether, in case of a public utility corporation being rendered incapable of performing its public duty without submitting to such terms as its employees, acting in combination, may prescribe, thus causing injury to the public, it is competent for the court to interfere by its coercive authority and, directly or indirectly, compel submission on the part of the utility. That is the natural effect of such an order as was entered in this case. It left the appellant no recourse but to either surrender or appeal, since the trial court, as it had reason to suppose, was of the opinion that insistence upon not bowing to the demands of the employees was remediably unreasonable, rendering it futile to answer, as the facts from which the inference was drawn were not disputable.

It is a very great power of the court, if it has such power,

to do what was, seemingly, the effect of the order complained of. It is not necessary to the decision of this case to determine whether it has such power or not. It is very difficult, if not impossible, to place a limit on the equity power of the court, so far as its protective feature is concerned. But whether to use that power and the extent of its use, must, generally, rest in the sound judgment of the chancellor. The greater the power, ordinarily, the greater the degree of judgment required in order to use it wisely, and never to abuse it. The thing always to be kept in view in a case of this sort, is equality before the law. Individual rights may be regulated legislatively and restrained judicially, for the purpose of conservation, but not unduly impaired or destroyed. Where the right on the one hand meets the right on the other, the court should not step in and take away one to permit supremacy of the other. Where the right, especially in case of a public-service corporation as regards its performance of its *quasi*-public duty to unrestricted liberty of action, ends, must be, often, a very difficult question to solve and be dependable upon the just solution of complicated questions of fact—so complicated as to call for much hesitancy and the exercise of superlative judicial care before dictating an unconditional surrender of one side to the other.

With these remarks we pass to the question which is decisive of this case, not intending to suggest that an occasion might not arise, or may have existed in this case, warranting the exercise of the equity authority of the court to solve the difficulty.

What has been said, suggests the advisability, if not the necessity, in such a situation as existed in this instance of having a tribunal before which all the facts can be fully investigated. In no other way, it seems, can violated rights be redressed and violations of rights be prevented with any fair degree of certainty, without peril of violating, seriously,

the rights of one party in attempting to conserve those of another. No favoritism between parties, public or private, but absolute equality before the law, so far as that can practicably be established, is the very groundwork principle of our system. It is the public interest and mutuality of rights between private parties and between them and the public which is the great subject of solicitude in such controversies. Appreciating that, the people, acting through the lawmaking body, have provided a tribunal to act, *quasi*-judicially, in dealing originally with such questions as are raised in this case,—so far as they might otherwise be a subject for judicial interference, including interference in equity,—and provided a method of judicial review of its determination as regards whether unlawful or unreasonable. In that we have a comprehensive system which affords full hearing and investigation before condemnation, in recognition of the vital principles of natural justice.

Secs. 1797—2 to 1797—16, inclusive, of the Statutes cover the whole subject. They clothe the railroad commission with full authority to act in all controversies as regards the duties of public-service corporations of the class of the one in question, and prescribe a simple way of invoking its jurisdiction, and provide adequately for a judicial review, first in the circuit court and then in this court, if desired.

The new system did not absolutely take away any of the constitutional jurisdiction of the circuit court; but, the deference to the legislative will, which is due to a co-ordinate department of the government, requires that such jurisdiction shall not be exercised in any situation—which the legislature placed, as matter of administrative power, in that of the railroad commission as regards original action,—in the absence of some extraordinary emergency not liable to arise.

This species of duty not to act, even in case of the existence of power to act, is so regarded that a violation of it

takes the cast of jurisdictional error. *Meyer v. Garthwaite,* 92 Wis. 571, 66 N. W. 704; *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304. Not jurisdictional in the sense of entire want of power, rendering the act usurpatious and the result void, but in the sense of such manifest duty not to exercise the power, that the wrong of it should be classed as jurisdictional, and competency exist to efficiently raise the question in respect thereto at any time while competency remains to challenge the order or judgment involved, for judicial error. *Harrigan v. Gilchrist,* 121 Wis. 127, 224, 99 N. W. 909.

Under the foregoing rule, the court below must be considered as not having had jurisdiction to entertain the proceedings in question. It should have left the parties to the remedy prescribed by law before the special tribunal—the railroad commission. That is in harmony with the previous decisions of this court. *Frank A. Graham Ice Co. v. C., M. & St. P. R. Co., ante,* p. 145, 140 N. W. 1097, 1101.

It is also in harmony with the decisions of other courts in the same or similar situations. *Nebraska T. Co. v. State,* 55 Neb. 627, 76 N. W. 171; *Atchison, T. & S. F. R. Co. v. Foster L. Co.* 31 Okla. 661, 122 Pac. 139; *Wickwire S. Co. v. N. Y. C. & H. R. R. Co.* 181 Fed. 316.

By the Court.—The judgment is reversed, and the cause remanded with directions to grant the motion to quash and to dismiss the proceedings with costs.

KERWIN and TIMLIN, JJ., dissent.

APPENDIX.[1]

TOWN OF SEIF, Respondent, vs. TOWN OF EATON, Appellant.

February 19—March 11, 1913.

Highways: Town-line roads: Apportionment for repair: Division of town: Reapportionment: Proceedings: Oral agreement, how far binding: Bridge built by one town: Liability of other town to contribute.

1. An order apportioning a town-line highway between two adjoining towns for maintenance is abrogated by a division of one of such towns and the creation of a new town out of that part thereof which lies adjacent to the highway.
2. In such a case, sec. 1273, Stats., provides for a new apportionment of liabilities in respect to the highway by agreement of a majority of the supervisors of each town, or, failing that, by a different method, the whole scheme indicating a purpose to avoid a divided responsibility respecting maintenance thereof.
3. To make a valid reapportionment of the highway, no board action of the respective towns is required, nor need the meeting of the supervisors be upon notice specifying its particular purpose. The meeting contemplated by the statute is neither a general nor a special one of the respective town boards, but is a joint meeting of at least a majority of the supervisors of each town, with authority, if they agree, to bind both towns by their order.
4. In making such new apportionment the supervisors have nothing to do with the original order, which is vacated by force of the statute, and no notice is required of a purpose to change it.
5. Whether or not an oral agreement between the supervisors, not formulated in an order, would be binding on the towns if objected to before expenditure of money thereunder, *it seems* that to the extent of its mutual observance it would be binding.
6. Where, pursuant to such an oral agreement, one town for several years maintained a certain portion of the highway and

[1] The two cases included in this appendix were not printed in their regular order because of the pendency therein of motions for rehearing, which were afterwards abandoned.

then undertook to rebuild a bridge therein, the fact that the chairman of the adjoining town, as a member of the county board, was instrumental in securing county aid toward the construction of such bridge, did not tend to establish the liability of his town to contribute to the expense, but rather the reverse.

7. Even if there were a joint duty on the part of two adjoining towns to repair or rebuild a bridge upon a town-line road, the mere fact that one has voluntarily solely performed such duty does not render the other liable to repay any part of the expense. Such liability arises only where there has been a previous refusal to join in the burden.

8. Mere use by the public of a town-line bridge so built at the expense of one town is not such an appropriation and beneficial use of it by the adjoining town as would render it liable to pay any part of the cost.

APPEAL from a judgment of the circuit court for Clark county: JAMES O'NEILL, Circuit Judge. *Reversed.*

Action to recover one half of the expenditure made by plaintiff in constructing a town-line bridge.

The issues are indicated by the following disposition thereof by the trial court; conclusions as to formal matters and capacity to sue being omitted:

In 1901 plaintiff was formed out of part of the town of Weston in Clark county. Such town adjoined the defendant. While the two so joined, a highway was duly established and opened for travel on the line between them and an order was duly made assigning a part thereof to the town of Weston for maintenance. Thereafter a bridge was constructed as part of the highway within the limits so assigned. Thereafter by formation of plaintiff the portion of the highway which included the bridge became a town-line highway between plaintiff and defendant. Thereafter in 1907, the bridge became unsuitable for public use and had to be replaced by a new one. Then the assessed valuation of plaintiff was $284,068, while that of defendant was $752,439. That condition substantially continued down to the commencement of this action. In August and September, 1907,

plaintiff caused the needed new bridge to be constructed at a cost of $960, one half of which it paid and one half was paid by the county of Clark pursuant to the statutes on the subject of county aid in such cases. Application to the county therefor was made by plaintiff, because, on account of the small assessed valuation of property therein, it had statutory capacity therefor, while defendant did not. The latter's supervisors had knowledge of all facts as they occurred. Its chairman was a member of the county board, acted with his associates in passing upon such application, and was chairman of the committee of such board which acted in its behalf in letting the bridge contract. Since construction of the new bridge, the taxpayers of both towns have enjoyed the use thereof in common. Plaintiff duly presented a claim against defendant for reimbursement for one half of its aforesaid outlay. Such proceedings were had in regard thereto that the claim was, in due form, disallowed and capacity of plaintiff accrued to test the rightfulness thereof by action.

Upon the facts, found as aforesaid, the court concluded that, by creation of plaintiff out of the town of Weston, the order as to the maintenance of the highway where the bridge was located was abrogated; and that the defendant, under the circumstances, was equitably liable to plaintiff for one half its expenditure, as claimed. Judgment was therefor so ordered in this action and was rendered accordingly.

For the appellant there were briefs by *R. F. Kountz* and *Geo. L. Jacques,* and oral argument by *Mr. Jacques.* They cited, among other cases, *Montgomery v. Scott,* 34 Wis. 338; *Waupun v. Chester,* 61 Wis. 401, 21 N. W. 251; *Kneeland v. Gilman,* 24 Wis. 39; *Houfe v. Fulton,* 34 Wis. 608; *Witter v. Grand Rapids F. M. Co.* 78 Wis. 543, 47 N. W. 729; *West Bend v. Mann,* 59 Wis. 69, 17 N. W. 972; *Bloomer v. Bloomer,* 128 Wis. 297, 107 N. W. 974; *State v. Childs,* 109 Wis. 233, 85 N. W. 374.

R. J. MacBride, for the respondent.

MARSHALL, J. It is conceded that the creation of plaintiff vacated the order assigning that part of the town-line road where the bridge was located to the town of Weston for maintenance and the responsibility for such maintenance devolved upon plaintiff and defendant, subject to a new arrangement between them apportioning to each its particular part for such purpose. In such a case sec. 1273, Stats., provides, "A majority of the supervisors of each such town shall, before the time for making the next subsequent tax roll, meet together with a majority of the supervisors of such new town . . . and all of them when so convened shall, if they can agree, make a new order apportioning their liabilities on account of such highway, which shall be filed" as in case of the original order. In case of failure to make such new division in the manner indicated, the statute provides for accomplishing it in a different manner,—the whole scheme indicating that, as to a laid-out road, there shall be no divided responsibility respecting maintenance thereof.

Counsel for appellant, at the proper time in the course of the trial, endeavored to prove that there was a meeting of supervisors and an arrangement made for maintenance of the bridge, as the statute requires. All evidence in respect to the matter was rejected, *first,* for want of proof of any discussion at the meeting of supervisors as to changing the original order made in 1898; *second,* for want of proof of any notice to each of the supervisors of the purpose of the meeting. Before the final ruling was made, evidence had been received, under objection, showing that a majority of the supervisors of each town convened, intending to make a division of the highway, and that a decision was made in respect to the matter; also evidence indicating, or an offer of such evidence, that the agreed arrangement was carried out and that it did not contemplate that defendant should bear any part of the burden of building the bridge, proper. All evi-

dence introduced or offered was held improper, for the reasons specified, and such as had been received was actually, or in effect, stricken out.

It seems clear that the ruling above mentioned was erroneous. The statute does not provide that the meeting of supervisors shall be upon notice specifying its particular purpose. It merely provides that a majority of the supervisors of one town shall meet with a majority of the supervisors of the other and that they shall make an adjustment to fit the new condition, in case all agree. The statute does not seem to contemplate any board action of the supervisors of the respective towns for the purpose of providing for holding the meeting. No provision is made for notice of any sort. The meeting contemplated is neither a general nor a special one of the respective town boards; but is a meeting of at least a majority of the supervisors of one town with a majority of the supervisors of the other, and with authority, if all agree, to bind both towns; the result to be evidenced by an order made by them and filed for record in the office of the town clerk in each town. Furthermore, no notice was required in any event of a purpose to change the original order made in 1898.

The trial court seems to have dwelt much on that. Why so does not appear. The supervisors in making a new assignment had nothing to do with the original order. That was vacated by force of the statutes. They met to deal with the matter from an original standpoint.

The error of the circuit court, as above indicated, disabled appellant from having the benefit of evidence which might have established a perfect defense to the action. It may be it might not have been able to prove the filing of a new order; but the offer of evidence was ample to make a case with technical accuracy. However, if there were some failure to strictly follow the statute in respect to the matter, yet both towns having, for years, acted upon the faith of the agree-

ment, as there is strong indications that they did, respondent had no legitimate standing to justify it in changing its attitude. Whether an arrangement irregularly made between the two towns would be binding if objected to before expenditure of money thereunder, or form a legitimate basis for compulsory action, is one thing, and whether the irregularity would be material as to expenditures made while both parties were acting on the faith of the agreement being binding, is quite another. The latter seems to be respondent's situation. While there has been some change in the statute since *Montgomery v. Scott,* 34 Wis. 338, the logic thereof supports the idea that a verbal agreement apportioning the burden of maintaining a town-line road is, to the extent of its mutual observance, binding.

So far as this case goes it bears out the idea of appellant that respondent regarded the responsibility for maintenance of the bridge, proper, to be wholly its own. No request to, or demand was made of, appellant in advance of constructing the bridge for its share of the expense which respondent incurred. The county was petitioned to assist plaintiff upon the theory of the bridge being wholly within its jurisdiction. The idea of holding appellant jointly liable seems to have been wholly an afterthought, and is inconsistent with everything which occurred theretofore, either in respect to the relations of respondent with the county or with appellant.

Much is made in the trial court's disposition of the case of the circumstance that the chairman of supervisors of appellant was a member of the county board when respondent petitioned the county in respect to the bridge, acted with his associates on the petition and as a member of the committee of the county board in constructing the bridge. No reason is perceived why his performance of duty as a member of the county board in executing the statute respecting county aid to respondent in maintaining the bridge, considered as its duty, otherwise, to wholly maintain, should count against his

town in this case. It seems that a circumstance which was, really, strongly persuasive against the theory of liability of appellant to respondent, was turned the other way through a misconception of the real situation.

A further reason for disapproving of the decision below is this: This is not a case, in any view of it, of joint duty to do a particular act, requiring pecuniary outlay, and performance by one after refusal by the other to join in bearing the burden, as in *Waupun v. Chester,* 61 Wis. 401, 21 N. W. 251; *West Bend v. Mann,* 59 Wis. 69, 17 N. W. 972; and *Bloomer v. Bloomer,* 128 Wis. 297, 107 N. W. 974. The learned circuit judge seems to have relied on the rule of those cases, failing to see, however, absence of one of the circumstances vital to its application; viz. refusal of the town sought to be coerced, prior to performance of the duty, to participate in such performance. The gist of the matter appears from this language in *Waupun v. Chester, supra:*

"If one of two towns which are jointly bound to keep a bridge in repair refuses to join in making necessary repairs, the other town may make them and recover the proper proportion of the expense thereof from the town so refusing."

The learned circuit judge said:

"There being joint liability and duty, there arises an implied contract to repay. This rule applies to a case where money or other property is received under such circumstances that the general law, independently of express contract, imposes the obligation to do justice."

The premises are wrong. Mere joint liability and duty does not give rise to liability of one of two joint obligors to the other who may have voluntarily solely performed such duty. The implied contract to contribute springs from the necessary payment by one of that which the two, jointly, should pay. In case of a mere voluntary payment, as in this case, the law does not impose any obligation to contribute.

In each of the authorities cited by the trial court to sup-

port the conclusion reached there was, significantly, the vital element which is wholly absent here, such as *Waupun v. Chester, supra.* The cases cited to the effect that, where a municipality contracts beyond its power, or irregularly, but not in violation of an express prohibition, and obtains the benefit thereof for legitimate municipal purposes, it is liable, if not on the contract then upon equitable principles, such as *Schneider v. Menasha,* 118 Wis. 298, 95 N. W. 94, and *Argenti v. San Francisco,* 16 Cal. 255, are beside the one here. Neither the circumstance of previous agreement nor that of subsequent appropriation are now present. Mere use by the public of a bridge, as in this case, there being no opportunity for the municipality, as such, to accept or reject it, is not such an appropriation as the rule calls for.

On the whole, in any view we can take of this case, it does not seem that appellant had a fair trial, or that legal principles were correctly applied to the facts.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

TIMLIN, J., dissents.

RUESCH, Respondent, vs. SENTINEL COMPANY, Appellant.

March 12—April 8, 1913.

Master and servant: Personal injury: Negligence: Defects in elevator: Evidence.

Plaintiff, a machinist, was injured while repairing the trap doors at the top of the shaft of an hydraulic elevator in defendant's building. He was sitting upon the floor of the elevator with his feet hanging over the edge, and the injury is alleged to have been caused by a leak in the intake valve, resulting in

abnormal, self-starting, upward movements of the elevator, whereby plaintiff's legs were caught and jammed between the elevator floor and the under side of the frame of the doors. Upon the evidence (stated in the opinion) it is *held* that there could be no reasonable inference that the movement of the elevator at the time of the accident was due to a leaky valve, and that a verdict for defendant should have been directed on the ground that no actionable negligence on its part was shown.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

The plaintiff is a machinist, and on July 2, 1907, was employed by the defendant to make certain repairs on trap doors covering an elevator shaft located in an alley outside of defendant's building in the city of Milwaukee, which shaft extended from the basement floor of the building to the surface of the alley. When the elevator was not in use these trap doors were closed down, being so constructed as to permit teams to travel over them. A hydraulic elevator was operated from the basement floor to the surface of the alley and above it to a distance about equal to the height of an ordinary wagon. The elevator was operated by means of a cable, which when pulled down would lower the elevator and when pulled up would raise it. On the day in question the elevator was placed in such a position as to enable the plaintiff to stand or sit upon the floor thereof and work on the underside of the trap doors inside the shaft. He sat upon the floor with his feet hanging over the edge, and while in this position his legs were caught and jammed between the elevator floor and the under side of the frame to which the trap doors were fastened. This action is brought to recover damages for injuries sustained.

The complaint alleged that the elevator was out of repair and defective and had been for a long time and was known as a creeping elevator; that plaintiff had no knowledge of its

defective condition and that defendant did not advise him of it. The answer put in issue all the material allegations of the complaint. The jury returned a verdict in favor of the plaintiff, and from a judgment entered on such verdict the defendant appeals.

For the appellant there was a brief by *C. H. Van Alstine,* and oral argument by *Mr. Van Alstine* and *Mr. Charles Quarles.*

For the respondent there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *A. J. Schmitz.*

BARNES, J. The plaintiff's right to recover must be predicated on these grounds: (1) There was a leak in the intake valve of the elevator, in consequence of which plaintiff was injured. (2) The valve was defective for such a length of time that defendant was chargeable with actual or constructive notice of its condition. (3) The defendant was negligent in failing to warn the plaintiff of the defect complained of.

The evidence in behalf of the plaintiff was to the effect that while he was working on the elevator it raised by a series of short jerks of about a quarter of an inch each, and that it raised in this manner about two inches in the course of an hour. The plaintiff's father, who completed the work after his son was hurt, testified that while he was at work the elevator raised about sixteen inches in twenty minutes. Two elevator inspectors of the city of Milwaukee, Otto Fischer and George Mueller, were sworn as experts on behalf of the plaintiff. Fischer testified that the abnormal movement which took place on the morning of the accident was due to a leak in the intake valve *and could be accounted for in no other way.* He also testified that such a leak would produce the jerky motion testified to by the plaintiff and his helper, Fleck. Mueller testified that the movement was due to one

of two causes, either the valve was not closed in the first instance or else there was a leak in it. The uncontradicted evidence also showed that the water pressure was fifty-five pounds to the square inch.

The appellant makes two contentions which go to the merits of the case. The first is that the evidence tending to show the jerky motion is incredible because contrary to physical laws. The argument in support of this claim is that water is practically incompressible, and that with a constant and steady pressure a leaky valve would produce a constant and steady upward movement of the elevator. The second point made is that the evidence does not show or tend to show that the defendant had any knowledge, actual or presumed, that there was any defect in the valve prior to the time of plaintiff's injury. If either of these contentions is decided adversely to the plaintiff, he has no cause of action because no negligence would be shown on the part of the defendant. The conclusion reached on the appellant's second contention renders any consideration of the first one unnecessary.

The elevator in question was adjacent to an alley and was intended to travel from the basement of the building to a point about three feet above the first floor. It was used for receiving paper and other freight from trucks and lowering it into the basement, and also for the purpose of elevating cores, waste paper, etc., intended for shipment, from the basement to such a height that these articles could be conveniently loaded on trucks in the alley. For some time before the accident one Haisler was employed by the defendant to do its trucking. Two of the teamsters, Otto Buntrock and Herman Rauschenberger, employed by him were sworn as witnesses on the trial, and it was by their testimony the plaintiff sought to show notice of the defect in the elevator that was responsible for the injury to him. Buntrock testified:

"Well, I used to put rolls on there and she would go way down. Took the roll off, started the elevator, she would go up about three feet and stop, then I would holler, 'What is the matter with the elevator?' . . . He would start the elevator again, she would come up, she would go up probably five inches below the wagon and stay there. The time I got started to get the rolls she was up way over the wagon. It would start by itself. I would call him and he would lower the elevator. I have noticed the elevator when it stopped three or four feet up, start by itself from that position. It would start just by jerks. It would go up from six inches to a foot and then stop by itself. I knew that pretty near all the time I was hauling there. I hauled there about eight months before plaintiff was hurt. I went there two or three times a week. The elevator did not act that way every time, but it did most of the time. I have seen the elevator stay there some time about ten minutes and then come up. Never saw it stay that way hardly an hour though and then come up. I have seen it jump up from six inches to a foot. It would not do all that in one jump, but it would be about two or three jumps."

This witness also testified that after the elevator came to a stop it would not start until the elevator man, who worked in the basement and did not ride on the elevator, started it again, and he also testified that it would. He also testified that the elevator would not go down of its own motion after a load was placed upon it. He knew the elevator started by itself because "he started and stopped and it started by itself." Could not see the elevator man after he started the elevator. Did not see the elevator move unless someone started it, for two or three weeks before the accident. The elevator was brought to the level of the wagon when freight was to be unloaded on it. It was put there by Billy Seyfried.

"*Q.* You also testified that when the elevator was placed that it had moved up some inches above the level of the wagon? *A.* Yes, sir. *Q.* Now will you state how often that happened? *A.* Well, I couldn't hardly do that."

Rauschenberger testified:

"When I took goods there to be unloaded the elevator was operated by a man by the name of Seyfried. The way he would bring it up, he would start it and let it go. At times it would come right straight up, and at other times she would come up part ways and she would stop. She would, you might say, practically come to a stop and she would start and go away.

"*Q.* How would it start again away, by somebody starting it or what? *A.* No, sir, she would start by itself.

"*Q.* Did you ever speak to Mr. Seyfried, the elevator man, about it? *A.* Yes, sir.

"It was several months prior to the accident that I first noticed that the elevator after it was started would come up and stop and then start again. It didn't do that every time, but it was most every time. I couldn't say that I ever saw it start of itself until it had first been started. As to how far up it would go when it started of itself, she would act different at different times. Sometimes she would start up and she would go probably about six or eight inches and she would stop, and other times she would get started and go with a jerk and go right straight up, but I have seen it go up five or six inches and then stop and then start again and come up five or six inches. Sometimes she would go further and sometimes she would go clear up."

It appears directly from the evidence of this witness and inferentially from that of Buntrock that Seyfried, the elevator man, worked in the basement taking care of the rolls of paper as they were lowered, and that he simply pulled the rope or chain in the basement whenever he desired to move the elevator up or down. Mr. Rauschenberger also testified that he did not know whether the elevator acted abnormally during the month of June or not. Plaintiff was hurt on July 2d.

The following hypothetical question, based on the evidence of Buntrock and Rauschenberger, was propounded to the expert Fischer:

Q. Mr. Fischer, assuming that an elevator—hydraulic elevator such as you examined at the Sentinel alley is started upward by an operator and after having gone up part ways stops by itself and then again starts upward by itself. What in your judgment and opinion was the cause of such second upward movement?"

To which the following answer was given:

"There is quite a few causes. One cause is the controlling system might be so that the valve—the controlling system could work backwards and kind of half close the valve and that the water going in slower then where she did not start, she would be bound, the platform itself would bind against the run wheel on either side, and as soon as enough pressure got into her again, she would go up and go to the next stop."

The following question, based on the testimony of the same witnesses, was asked of the expert Mueller:

"An operator starts the elevator, but don't go up with it at all. Just gives it a start to go this distance, but instead of going that distance it stops on the way three or four feet or some distance up, stops a little while, just for a very short period, and then starts up again and goes higher. It may stop again and start up or go clear up without any operator handling or having anything to do with the elevator. Now, what in your judgment is that due to?"

The witness answered as follows:

"Only I can see the reason only is that the operating valve shifting cable which is on the change valve, what we call the operating valve, that the turn buckle on one side which connects the two cables and the stop buttons on the same side might have been so heavy and loose that the chain works so easy that when it pulls down the turn buckle goes up and that turn buckle is liable to pull that valve around and stop it from itself. I can only see that under those conditions."

The further question was then asked:

"What would cause it to start by itself up again after it stopped? *A.* Because he didn't close off the port entirely."

It will be observed from this evidence that Seyfried customarily pulled the rope and opened up the intake valve and started the elevator on its upward journey, and that the difficulty was that at times the valve would partially close automatically and that such partial closure would result in the irregular motion testified to. It is perfectly obvious that a leak in the intake valve could not account for this motion when the valve was open. Neither could a leak sufficient in size to raise the elevator but a slight distance account for the fact that the elevator descended three feet when a roll of paper was placed on it. Such a movement must be due to the fact that the pressure from above was greater than the fifty-five pounds pressure to the square inch from below, and the further fact that there was an outlet of substantial size through which the water could escape. The plaintiff's experts do not attribute these movements to a leaky valve, but say they were due to an entirely different cause. It is not claimed that this cause had any connection with the injury to the plaintiff.

One further hypothetical question asked of the witness Fischer remains to be noticed. It was:

"Now assuming that this freight elevator of the *Sentinel Company,* the kind that you examined as stated in your testimony, supposing or assuming that that elevator is brought to a standstill when raised up on a level with the wagon from which freight is to be unloaded onto the elevator, to be taken down onto the elevator, to be taken down into the basement, and after having been stopped with the level of the wagon, should raise a few inches above the wagon, what in your judgment is that due to?"

To this question the witness answered: "A leak in the valve." It goes without saying that a failure to close the valve would produce the same result. The expert Fischer so testified.

Taking Buntrock's entire evidence, from a careful reading of it we are at a loss to know whether he meant to testify that Seyfried at any time stopped the elevator at a height even with the wagon and that it thereafter went upward two or three inches of its own motion. He may mean this or he may mean that Seyfried started the elevator and that it stopped at the right height and then raised three inches more. Such movement would be the result of the partial closing of the intake valve according to the uncontradicted testimony. Buntrock testified that he could not see Seyfried after he started the elevator. It is also undisputed that there was an automatic device on the elevator which brought it to a standstill at a point which would be substantially on a level with the platform of a truck placed adjacent thereto in the alley. If Buntrock did mean to testify that Seyfried actually stopped the elevator, the later movement might be due to a leak in the valve or it might be due to the fact that he did not entirely close the valve. Either condition would produce the same result.

The following facts are undisputed: Buntrock would not say how many times he observed this particular movement. This might mean that he saw it once or more than once. It did not occur at all for two or three weeks before the plaintiff was injured. Rauschenberger did not observe any abnormal movement of the elevator for more than a month before the injury. The elevator was inspected daily. A new intake valve had been put in place from two to four months before the accident. The life of such a valve is about one year. The intake valve that was in use when plaintiff was injured was thereafter used from six to nine months. During that time no such movement of the elevator occurred. There is no evidence to show that the elevator ever started up of its own motion after the operator had brought it to a standstill, unless

Buntrock intended to so testify. Rauschenberger saw no such movement. We are entirely in the dark as to whether Buntrock had an isolated case in mind, and are confronted with the impossibility of the witness knowing what Seyfried did, as he admits that Seyfried could not be seen after the elevator started upward. No such result having been observed for a considerable length of time before the accident nor for six months thereafter, the conclusion is irresistible that if it did take place it was due to the fact that the valve was not entirely closed when the movement took place. The burden was on the plaintiff to show negligence on the part of the defendant which proximately caused the injury, and this burden has not been met. The action of water under a given pressure is reasonably constant. Proof that at some uncertain time more than two weeks before the injury the elevator made an abnormal movement which might be accounted for by a leak in the valve or another nonactionable cause, and that it made another such movement at the time of the accident, but did not make another one until the valve was changed some six or nine months thereafter, demonstrates clearly that the plaintiff's injury was not due to this cause. Whether it was due to the failure of Seyfried to entirely close the valve or to the mistake of the plaintiff in pulling the wrong rope, as defendant's evidence tends to show, is immaterial. It is not a reasonable inference, or even a reasonable conjecture, to draw from the evidence that the movement on the morning of the accident was due to a leaky valve. There is plenty of evidence in the case tending to show that the elevator acted abnormally when the intake valve was opened up. There is no testimony to show that such abnormal action was responsible for the accident or had anything to do with it. There is no evidence which would warrant a jury in finding that there was any abnormal action when the intake valve

was closed. We think the court should have directed a verdict for the defendant because the proof failed to show actionable negligence on its part.

By the Court.—The judgment is reversed, and the cause is remanded with directions to dismiss the complaint.

SIEBECKER, J., took no part.

KERWIN, J. I concur in the reversal of the judgment below, but not in the dismissal of the complaint. I think the cause should be remanded for a new trial.

TIMLIN, J., dissents.

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1. The supreme court has inherent authority to regulate the use of its jurisdiction so as to prevent successive appeals from a judgment and to promote, so far as practicable, a speedy and final determination of all questions involved. *Gerts v. Milwaukee E. R. & L. Co.* 475

2. Thus, in an action for personal injuries against two defendants, where judgment went against one and in favor of the other and plaintiff appealed from the latter part of the judgment, but the losing defendant claimed that its rights should not be determined on that appeal and that it might, later, take an appeal on its own behalf, a reasonable time is given to such losing defendant to present its objections to the judgment, taking an appeal in due form if necessary, to be considered and determined with plaintiff's appeal. *Ibid.*

3. It is made a rule for such cases, subject to such variation as the peculiar facts of each case may require, that if any party affected by a judgment or order, who shall have had due notice of an appeal and the proceedings thereon, does not appropriately challenge such judgment or order, this court will conclusively presume that he has elected to waive the right to do so and will so dispose of the appeal as to preclude any further application to this court in respect to such judgment or order, other than the ordinary motion for a rehearing. *Ibid.*

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5. In general, an assignment of error which is not deemed by counsel to be of sufficient importance to warrant argument will be passed as inconsequential. *Imperio v. State,* 455

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6. Where, after suit brought to enjoin the issue of increased stock, the corporate articles were amended, apparently in correction of a prior irregular attempt, and the increased stock legally issued, and the trial court thereupon dismissed the complaint but required defendants to pay the costs, this court on appeal declines to pass upon the legality of the prior attempt to amend the articles, the matter of costs being, in any event, within the discretion of the court below. *Zahn v. Rockland Telephone Co.* 286

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7. The rule that a trial judge's findings of fact are due to prevail unless contrary to the clear preponderance of the evidence, has weight according to circumstances. Its ordinary efficiency is lessened where findings rest on inferences from conceded or established facts, and reduced to a minimum or displaced where the conclusions are reached by mistaken ideas of law. *Ball v. Boston,* 27

8. A finding of fact without due heed for the rule respecting its establishment, has little or no support in the presumption of correctness which requires a clear preponderance of evidence to displace it. *Ibid.*

9. The distinction between clear and satisfactory evidence and mere preponderance of evidence, is substantial, and may properly be the turning force in balancing conflicting inferences. *Ibid.*

10. The rule that a finding of fact by the trial court should not be set aside on appeal unless it is against the clear preponderance of the evidence, is of less force where the finding is the result of inferences drawn from undisputed facts and partakes of the nature of a conclusion of law. *Knox v. Rochl*, 239

11. A verdict which the trial court has refused to set aside should not be disturbed on appeal, in disregard of the common sense of the jury and the learning and experience of the trial judge, upon mere theories of impossibility based upon literal interpretation of oral discourse, estimates of time, distance, and quantity, and impeccability of defendant's witnesses. *Novitski v. Waite Grass Carpet Co.* 266

12. The decision of the trial judge in respect to whether evidence presented a jury question—the ruling in this case having been made both in refusing to take the question from the jury and in refusing to change the verdict—should prevail on appeal unless it appears from the whole record, having regard for his superior advantages, to be clearly wrong. *Gertz v. Milwaukee E. R. & L. Co.* 475

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13. In an action for death caused by negligence it was error to admit evidence as to the age and health of the parents of the widow and the age of the father of the deceased; but as such evidence could affect only the question of damages and it appears that the amount awarded is not excessive, the error was not prejudicial. *Serdan v. Falk Co.* 169

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15. Notice of appeal in a criminal case is "given" to the judge of the district court of Milwaukee county within the meaning of sec. 4761, Stats., by filing such notice with the clerk and calling the attention of the court to such filing by motion for a *supersedeas* and presenting a recognizance on appeal for his approval or allowance. *State ex rel. Kassner v. Momsen*, 203

16. A statute giving a convicted person ten days in which to appeal and permitting a *supersedeas* on such appeal if a bond is filed and approved by the judge, gives the judge power to grant a stay of execution upon application of such person to enable him to appeal. *Ibid.*

17. The term of imprisonment of a convicted person does not commence before the day on which such a stay of execution expires. A *dictum* in *In re Crow*, 60 Wis. 349, to the effect that the day of sentence is the first day of the term, limited. *Ibid.*

18. Where, after the giving of notice of appeal, an attempt is made to give a recognizance and a motion is also made to dismiss the appeal, the judge of the district court may, by virtue of the power inherent in courts of record, delay the execution of sentence until such matters are determined; and the term of imprisonment will not be held to have begun while execution is so delayed. *Ibid.*

19. No delay of commitment secured by legal strategy will be considered a substitute for personal presence in jail, and there is no fiction of law by force of which one can be at the same time in jail and at liberty. *Ibid.*

Appeal from Milwaukee civil court.

20. An attempted appeal from the civil court of Milwaukee county is ineffective unless the notice of appeal and affidavit of good faith are served upon the civil judge; and a mere general appearance of the parties in the circuit court without a trial *de novo* does not cure the defect. *Manufacturers & M. I. Bureau v. Everwear H. Co.* 152 Wis. 73, distinguished. *Saltzstein v. Nahmens*, 272

21. On appeal in such a case from a judgment of the circuit court affirming a judgment of the civil court, the supreme court acquires jurisdiction of the case sufficiently to reverse the judgment of the circuit court for lack of jurisdiction there. *Ibid.*

22. In such a case a motion to strike the cause from the calendar of the supreme court, made by the appellant in order to save himself from an affirmance of the judgment under the rule because of his default in serving his printed case and brief, will be denied. *Ibid.*

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1. A national society or lodge is not liable to pay for services rendered (in this case by a state organizer) to a subordinate state union or lodge under an express contract by the latter to pay therefor, in the absence of facts or circumstances raising an implied promise to pay on the part of such national society. The mere fact that the services ultimately benefited the national society is not sufficient to raise such a promise. *Crawley v. American Society of Equity*, 13

2. In order to organize under ch. 92, Stats., a society must elect trustees as required by sec. 2002, and until it has done so it cannot be sued in the name of the trustees as provided in sec. 2003. *Ibid.*

3. An action to enforce a liability incurred by a mere voluntary association must be brought against its individual members. *Ibid.*

4. A voluntary association having been sued in its association name and, acting through its board of directors, having answered in that name and litigated the case upon the merits, the action is allowed to proceed to judgment against those who were members of said board of directors when the answer was served. Since the association could not defend, it is presumed that the defense was made for the individual benefit of such directors. *Ibid.*

5. It is immaterial in such case that the pleadings were not amended so as to substitute the names of the directors for the name of the association. *Ibid.*

6. The liability of members of a voluntary association for the debts thereof incurred during their membership for association purposes being joint and several, those members who thus voluntarily appeared cannot be heard to complain because other members were not made parties defendant. *Ibid.*

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Improvident admission: Revocation of license: Prosecution by bar association: Right of association to appeal.

1. An attorney at law is an officer of the court; and the court has ample power to protect itself, the bar, and the public against the danger of any one holding such office who is not legally as well as morally qualified therefor. *Vernon County Bar Asso. v. McKibbin*, 350

2. In determining whether the name of a member of its bar should be stricken from the roll, the court may act upon its own motion or upon application of any member of such bar (and especially of the bar acting collectively) or even of a private person. The technical status of an *amicus curiæ* has nothing to do with the matter. *Ibid.*

3. The mere lapse of the term at which a person was admitted to the bar does not disable the court from revoking his license to practice on the ground that he was not legally entitled to be so admitted. *Ibid.*

4. Where the legislature has prescribed conditions of eligibility to admission to practice law, which are reasonable, it is the duty of the court to enforce compliance therewith. *Ibid.*

5. Under sec. 1, ch. 19, Laws of 1903, a person who after being admitted to practice in the supreme court of one state did not practice in that state but did practice for two years in another state by virtue of admission in a lower court in the latter state, was not entitled, when he became a resident of this state, to be admitted to practice here. *Ibid.*

6. In admitting a person to practice upon proofs which show that he has not complied with the statutory conditions, the court commits a jurisdictional error which may be corrected at any time by expunging his name from the roll of attorneys. *Ibid.*

7. A bar association which petitioned the circuit court to revoke an attorney's license to practice, being competent to be heard on such petition, is entitled to appeal to the supreme court from an order denying it. *Ibid.*

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Sales: Payment by auctioneer to principal before buyer pays: Right to recover from buyer.

1. A person employed to sell another's property at auction, or a factor to whom property has been consigned for sale, has an interest in the proceeds of the sale entitling him to sue and recover the same in his own name; and in case he pays his principal in full and delivers the property before receiving payment from the buyer, and the principal accepts and retains the money, the agent becomes the sole party in interest and is entitled to recover of the buyer for his own use. *Progress Blue Ribbon Farms v. Chicago H. S. Co.* 249

2. In making such payment to the principal the agent does not act as a mere volunteer. *Ibid.*

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1. One who cashes a check upon the unauthorized indorsement of an agent of the payee is liable to the principal in case the proceeds are misappropriated by the agent. *Pluto Powder Co. v. Cuba City State Bank,* 324

2. The facts that an agent has possession of the goods of his principal for sale, that he is accustomed to receive checks for goods sold, payable to his principal, and sometimes collects money on sales, that he receipts for goods and also for moneys collected in the name of the principal, and has authority to employ help, to incur expense for livery, and to include livery bills in his account, do not clothe such agent with apparent or implied authority to indorse the principal's name upon checks so received or other negotiable paper. *Ibid.*

3. Authority to execute or indorse negotiable paper will not be implied from express authority to transact some other business, unless it is necessary to the exercise of the express authority. *Ibid.*

4. Third persons having notice that they are dealing with an agent are bound to inform themselves of the extent and limitations of his authority. *Ibid.*

5. Even an agent with general authority to manage the business of his principal has not, by reason thereof, implied power to execute or indorse negotiable paper. *Ibid.*

6. That the principal succeeds in obtaining from the agent part of the proceeds of checks unlawfully indorsed by him, is no evidence of ratification of his act in indorsing the same. *Ibid.*

Payment and discharge. See PRINCIPAL AND AGENT, 2.

BONDS, on appeal. See MUNICIPAL CORPORATIONS, 5, 6.

BRIDGES. See HIGHWAYS, 6–8. MUNICIPAL CORPORATIONS, 4. NAVIGABLE WATERS.

BRIEFS. See APPEAL, 22.

BROKERS.

Authority. See PRINCIPAL AND AGENT, 2–4.

Right to commissions.

1. Where an agent employed by the owner of land to procure a purchaser therefor at a specified price produces a person who is unwilling and whom the agent cannot induce to pay the price demanded, the owner may sell to such person at a lower figure without rendering himself liable to the agent for a commission, provided there is no fraud or bad faith on the part of such owner. *Terry v. Bartlett,* 208

2. The owner of land may place it in the hands of as many agents or brokers as he sees fit, so long as no exclusive agency is given; and if one of them produces a customer the owner is at liberty to deal with him and to pay the agreed commission in case of a sale, without ascertaining whether any other agent or broker has offered the property to such customer, the owner being ignorant of such an offer having been made. *Ibid.*

3. Plaintiff, who was to receive a commission if he sold defendant's land or procured a purchaser therefor at $60,000, offered the land to a person at that price but was unable to induce him to give more than $42,000. He reported that fact to defendant but did not disclose the name of his customer. Afterwards defendant, without knowing who plaintiff's customer was, sold the land through another agent to said customer for $43,500. *Held,* that plaintiff was not entitled to any commission. *Ibid.*

4. The owner of land who gives to a broker the exclusive agency to find a purchaser may himself sell the land to a person with whom the broker has no connection and, unless it be specifically so agreed, will not be liable to the broker for any commission on such sale. *Greene v. American M. Co.* 216

5. So *held* where the terms of the agency were shown by a letter from the owner to the broker, saying, "We agree with you that it is better that the sale of the property shall be exclusively in the hands of one broker, and you are the only person who is authorized to handle this property." *Ibid.*

BURDEN OF PROOF. See INSURANCE, 9. WILLS, 5–7, 14.

CAPITAL STOCK. See APPEAL, 6.

CARRIERS.

Carriage of goods: Overcharge: Interstate shipment: Jurisdiction of federal courts.

1. Where, by reason of misrouting by the initial carrier, the total freight charges paid by the consignee to the last carrier were in excess of the legal charges for transportation by the cheapest route, but none of the carriers received more than the lawful rate for carrying the goods over the route by which they were actually sent, an action by the consignee against the last carrier for money had and received will not lie. *Siggins v. Chicago & N. W. R. Co.* 122

2. Under the Interstate Commerce Act the interstate commerce commission and the federal courts have exclusive jurisdiction of all claims for overcharges on interstate shipments whether they grow out of an excessive rate or out of misrouting. *Ibid.*

Same: Loss of or injury to goods: Gaming instruments.

3. Where an article (in this case a slot machine) is useful and usable for gambling purposes only, and gambling is unlawful, and it is not shown that the article has any value except for use as a gambling device, such value will not be regarded as a legitimate measure of damages to be recovered where the article is destroyed. *Miller v. Chicago & N. W. R. Co.* 431

4. Where such an article has no value for any lawful purpose, no damages are recoverable against a carrier for an injury to it while in transit. *Ibid.*

CERTAINTY. See CONTRACTS, 2.

CERTIFICATE OF DESCENT. See DESCENT AND DISTRIBUTION.

CERTIFICATES OF DEPOSIT. See GIFTS.

CERTIORARI. See STATE PUBLIC SCHOOL, 3.

CHANGE OF VENUE. See VENUE.

CHATTEL MORTGAGES.

Requisites and validity: Form and contents of instrument.

1. A chattel mortgage is not rendered void by the mere fact that the promissory note which it was given to secure was, through inadvertence, not signed by the debtor, where such unsigned note clearly states the amount of the debt and the terms and conditions agreed upon for its payment and, except as to the signature, is clearly described in the mortgage. *Lierman v. O'Hara,* 140

2. A paper signed by the owner of an automobile: "June 2, 1908, Received of John Ure the sum of $2 to apply on Marmon car. Balance due, $1,748; the same to be paid on or before Monday, June 8, 1908. Ure agrees to give one free ride, say Sunday, June 7th," was clearly intended to evidence ownership and right of possession in Ure, and clothed him with at least equitable ownership and gave him capacity to make a valid chattel mortgage of the car, good as against any one not having a superior lien to the knowledge, actual or constructive, of the mortgagee. *Adler v. Godfrey,* 186

3. Mere inaccuracies in the description of property covered by a chattel mortgage are not fatal if the subject is so described

that it can be readily identified by the exercise of ordinary care, or even by the aid of extrinsic evidence, where there is sufficient in the writing to put one acting reasonably on inquiry. *Ibid.*

4. Thus, where the mortgagor had but one automobile, a chattel mortgage thereof stating correctly the manufacturer's name and the serial number of the car was valid, notwithstanding the description was not in other respects wholly accurate, and when such mortgage was filed the mortgagor's vendor (who had not been fully paid and who claimed that the title remained in him as security) was chargeable with notice of its contents and was at least put upon inquiry as to the identity of the car so mortgaged. *Ibid.*

5. Such mortgagor having, as provided in the mortgage, been permitted to remain in possession of the car, a garage keeper who stored it for him acquired no lien for such storage as against the mortgagee, even though the latter knew that the mortgagor was keeping the car in a public garage; and the vendor of the mortgagor acquired no such lien by paying the storage claim. *Ibid.*

Construction and operation: Right of mortgagor to possession.

6. Where a chattel mortgage is given, either in the form of a bill of sale or in the ordinary form, without anything being said as to possession pending maturity of the debt, the mortgagee, in the absence of any statutory regulation to the contrary, may exercise his own discretion as to taking possession of the property; and when the mortgagor, being permitted to retain possession for a particular purpose only, abandons such purpose and the property, the mortgagee as holder of the legal title may take the property. *Adler v. Godfrey,* 186

Foreclosure: Assent of mortgagor: Waiver of statutory requirements.

7. Ch. 122, Laws of 1903 (sec. 2316c, Stats.), refers to a *hostile* taking and sale of property under a chattel mortgage, and is inapplicable where the mortgagor assented to the sale. *Lierman v. O'Hara,* 140

CHECKS. See BILLS AND NOTES, 1, 2, 6.

CHILDREN. See STATE PUBLIC SCHOOL.

CIRCUIT COURTS. See JUDGMENT, 1.

CIRCUMSTANTIAL EVIDENCE. See INSTRUCTIONS TO JURY, 1.

CIVIL COURT OF MILWAUKEE COUNTY. See APPEAL, 20–22.

CLAIMS. See MUNICIPAL CORPORATIONS, 5, 6.

COLLATERAL ATTACK. See JUDGMENT, 2, 3.

COLLISION. See NAVIGABLE WATERS. STREET RAILWAYS, 4.

COMITY. See LIMITATION OF ACTIONS, 3–8.

COMMERCE.

Interstate commerce. See CARRIERS, 2. EVIDENCE, 1. RAILROADS, 26–28.

1. As regards appliances and instrumentalities used by a common carrier in the business of transportation, it is the use to which

it is put at the time, rather than the nature of the instrumentality itself, which determines whether or not it is employed in interstate commerce. *Ruck v. Chicago, M. & St. P. R. Co.* 158

2. Where such an instrumentality (in this case a boiler constituting part if the equipment of a wrecking train), at the time repairs are being made upon it, is not being used to facilitate interstate commerce, but is being repaired to make it ready for either interstate or intrastate use as occasion may require in the future, an employee engaged in making such repairs is not employed in interstate commerce within the meaning of the federal Employers' Liability Act. *Ibid.*

3. The words "employed by such carrier in such commerce," as used in said act, mean employed directly in transportation or in some act directly facilitating transportation. *Ibid.*

COMMERCIAL PAPER. See BILLS AND NOTES. CHATTEL MORTGAGES, 1. GIFTS. PRINCIPAL AND AGENT, 2. WITNESSES, 2.

COMMISSIONS. See BROKERS. PRINCIPAL AND AGENT, 3, 4.

COMPLAINT. See JUSTICES' COURTS, 1. NEGLIGENCE, 3. PLEADING.

COMPROMISE AND SETTLEMENT. See FRAUD, 2–4.

CONDEMNATION. See DEDICATION.

CONSIDERATION. See DEEDS, 7–9. JUSTICES' COURTS, 1.

CONSTITUTIONAL LAW.

Legislative powers. See MASTER AND SERVANT, 1, 2. PUBLIC UTILITIES, 3, 4. RAILROADS, 1–7.

Same: Changing common-law remedies.

No one has a vested right to the continuance of a common-law remedy for the redress of future wrongs; hence, secs. 1797—37*m* and 1797—12*a* are not unconstitutional because denying the right of trial by jury. Besides, a remedy by action against the railroad commission is preserved in favor of any aggrieved party, so that the rights of all parties are well guarded under the law. *Frank A. Graham I. Co. v. C., M. & St. P. R. Co.* 145

Judicial powers. See STATE PUBLIC SCHOOL, 2.

Due process of law. See STATE PUBLIC SCHOOL, 2.

CONTRACTS.

Requisites and validity. See ASSOCIATIONS. CARRIERS, 3, 4. CHATTEL MORTGAGES, 1–5. CORPORATIONS, 1. JUSTICES' COURTS, 2. MARRIAGE. SALES, 1, 2.

Same: Consideration. See DEEDS, 7–9.

Same: Mutuality.

1. Where a contract by which defendant agreed to pay a certain sum of money to plaintiff by a certain date contained no express covenants on the part of plaintiff, but a present release and assignment of certain so-called shares of stock, the rule of mutually dependent covenants has no application, and failure of plaintiff to deliver a further release and assignment, even assuming that defendant was entitled thereto, would not, in the absence of proof that defendant was damaged by such failure, defeat plaintiff's recovery upon defendant's promise to pay. *Jelinek v. Baer,* 426

Same: Certainty.

2. A written contract is not void for uncertainty when its provisions can be explained and rendered certain by competent evidence; nor is it rendered void by surplusage. *Jelinek v. Baer,* 426

Same: Contract to effect reconciliation between husband and wife.

3. An agreement by a husband, estranged from his wife, to pay a third person for effecting a reconciliation, is a legal contract, laudable in its purposes, and the right to recover thereon is not defeated by the fact that, in order to make a greater inducement to the wife, such third person joined with the husband in a scheme to deceive her as to the amount of money possessed by the husband. *Kiepert v. Nugent,* 127

Construction and operation. See CHATTEL MORTGAGES, 6. JUSTICES' COURTS, 1. PARTNERSHIP.

Same: Contract for benefit of third person: Enforcement.

4. A valid contract made with one person for the benefit of another may be at once enforced by that other, regardless of any formal assent thereto by him prior to the commencement of the action. *Zwietusch v. Becker,* 213

Performance or breach. See PARTNERSHIP, 4.

Action for breach. See LIMITATION OF ACTIONS, 3–8.

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 4, 5, 9, 10, 17, 34. MUNICIPAL CORPORATIONS, 2. RAILROADS, 10, 12–14, 18–23.

CORPORATIONS.

Liability of signers of articles before authorized to do business.

1. Acceptance by a corporation of the assignment to it of a lease running to one of its members, and assumption of the obligations imposed by such lease on the tenant, constituted the "incurring of a debt or liability" to the lessors, within the meaning of sec. 1773, Stats.; and where, at the time of such acceptance, one half of the capital stock of the corporation had not been subscribed nor twenty per cent. thereof paid in, signers of its articles of incorporation who knew of and consented to the assignment and its acceptance became personally liable to carry out the obligations of the lease. *Zwietusch v. Becker,* 213

Amendment of articles of incorporation. See APPEAL, 6.

Capital stock: Issue of unauthorized stock. See APPEAL, 6.

Foreign corporations: Disability to take title to land: Statute removing disability: Validation by grantor of prior conveyance.

2. Although a conveyance of land in this state to a foreign corporation which had not complied with sec. 1770*b*, Stats., was void, yet a grantee of such corporation who went into possession of the land under his deed had an interest therein which he could convey or mortgage, to wit, possession under claim and color of title. *Mortenson v. Murphy,* 389

3. One to whom such grantee of the foreign corporation sold and conveyed the land could tack his possession to that of said grantee to make up the ten-year period in which title could be acquired by adverse possession; and so also could purchasers at a mechanic's lien sale who succeeded to his rights. *Ibid.*

4. Where the original grantee of the foreign corporation mortgaged the land and afterwards sold and conveyed it subject to the mortgage, the right of the mortgagee was superior to that of the purchaser, and the interest acquired by the latter and those claiming under him, including the right of possession and the inchoate right to obtain title by adverse occupancy, might be foreclosed and sold under the mortgage. *Ibid.*

5. Ch. 142, Laws of 1911 (sec. 1770*j*, Stats.), which attempted to cure the defect in the title of foreign corporations to lands conveyed to them before compliance with sec. 1770*b*, Stats., where they had afterwards complied therewith, did not have the effect to vest the title in such a corporation immediately, but was in the nature of a statute of limitation and allowed the party dealing with the corporation a year in which to disaffirm his contract, and if he did not do so the conveyance in effect became validated. *Ibid.*

6. Land in this state had been conveyed to a foreign corporation coming within the terms of ch. 142, Laws of 1911. Such corporation conveyed to one Clare, who took possession and thereafter mortgaged the land to a bank, and then sold and conveyed it, subject to the mortgage, to one Morse. Through foreclosure of a mechanic's lien and subsequent conveyances the interest of Morse became vested in Murphy. After the enactment of the law of 1911 the original grantor of the foreign corporation quitclaimed to the mortgagee bank, and the bank thereafter quitclaimed the land and assigned the mortgage to plaintiff. In an action against Murphy and others to foreclose the mortgage, plaintiff having elected to take the position that defendants had an equity of redemption in the premises, it is *held* that the purpose of said original grantor in quitclaiming to the bank was to validate his conveyance to the foreign corporation and thereby to place all parties in the same position they would have occupied had the corporation been competent to receive and to transfer title in the first instance; hence that the mortgage is the prior and paramount lien and should be foreclosed accordingly. *Ibid.*

Same: Right to maintain action in courts of this state.

7. Stockholders and creditors of a foreign corporation which has its business office in this state may maintain an action in equity in the courts of this state against resident officers of the corporation to recover, on behalf of the corporation, corporate moneys converted by such officers, as well as moneys lost to the corporation by their fraudulent and negligent conduct. *Ganzer v. Rosenfeld,* 442

COSTS.

Persons entitled. See APPEAL, 6.

1. Where, in an action against two defendants, judgment went against one and in favor of the other and there were separate appeals by the plaintiff and by the losing defendant, but the latter devoted its efforts on the appeal toward establishing the joint negligence of its codefendant, it is *held* that upon a reversal of the judgment as to such codefendant only costs against the latter should be awarded to plaintiff, but no costs

for or against the appealing defendant, except that it should pay the clerk's fees upon its appeal. *Gertz v. Milwaukee E. R. & L. Co.* 475

Amount, rate, and items. See TRIAL, 2.

2. There is no statutory authority for taxing costs for drafting the report of a referee and making copies to keep and serve; but the sum of $6.10, taxed for such items, is too trifling to call for any further relief on appeal than the reduction of the judgment by that amount. *Lemma v. Searle,* 24

3. Where the complaint states a cause of action at law upon contract the costs, exclusive of disbursements, are limited by sec. 2921, Stats., to $25, although the answer interposes an equitable counterclaim which becomes the principal subject of litigation. *Baker v. Becker,* 369

Security for payment. See MUNICIPAL CORPORATIONS, 5, 6.

COUNTY JUDGE. See STATE PUBLIC SCHOOL, 1.

COURTS.
Federal courts. See CARRIERS, 2.
Supreme court. See APPEAL.
Circuit courts. See JUDGMENT, 1.
Milwaukee district court. See APPEAL, 15–19.
Milwaukee civil court. See APPEAL, 20–22.
Justices' courts. See JUSTICES' COURTS.

CRIMINAL CONVERSATION. See HUSBAND AND WIFE.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See HOMICIDE. PROSTITUTION. RAPE.

Preliminary examination.

1. If, upon the preliminary examination of a person accused of crime, there is competent evidence to give the magistrate any room for the exercise of judgment in determining the existence of the essential facts, his decision to hold the accused for trial is within his jurisdiction and cannot, upon a plea in abatement at the trial, be reversed on the ground that it was not warranted by the evidence. *State v. McGinley,* 5

Appeal and error: Review. See CRIMINAL LAW, 1. HOMICIDE, 2. RAPE, 3, 5.

2. If there is any evidence in a criminal action warranting submission of the question of defendant's guilt to the jury, it will suffice on appeal to support a conviction. *Imperio v. State,* 455

CROSS-EXAMINATION. See STREET RAILWAYS, 2. WITNESSES, 5.

DAMAGES.

Measure of damages. See CARRIERS, 3, 4. INSTRUCTIONS TO JURY, 2.

1. Where defendant's negligence is claimed to have caused fatal injury to plaintiff's intestate and it is sought to recover both the damages accruing to the decedent and those accruing to his surviving parents, burial expenses may be recovered under either cause of action; but when the action is brought for death and for the benefit of relatives who have no duty of interment cast upon them by law, that item of damages should

not be included in an award under the death statute. *Herning v. Holt Lumber Co.* 101

Excessive damages. See APPEAL, 13. TRIAL, 17.

2. Where the deceased was forty-one years of age, in good health, and earning about $15 per week, and left surviving a widow twenty-eight years of age, also in good health, a verdict of $4,500 for his death was not excessive. *Serdan v. Falk Co.* 169

3. Where plaintiff, a strong, healthy man thirty-seven years of age, earning $2.30 a day, lost his left leg four inches below the knee, was in the hospital for two months and under treatment for three months after that period, and was unable to walk without the aid of crutches at the time of the trial, three years after the injury, an award of $7,666.66 was not excessive. *Jakopac v. Newport Mining Co.* 176

4. An award of $1,200 in this case, reduced by the trial court from the jury's award of $2,000, is *held* not excessive. *Baermann v. Chicago & Milwaukee Electric R. Co.* 235

5. Where a woman three months advanced in pregnancy fell upon a defective sidewalk and a miscarriage and other ill effects resulted, and there was evidence that she had suffered permanent injury, an award of $2,500 was not excessive. *Madison v. Antigo,* 448

DEATH. See APPEAL, 13. DAMAGES, 1, 2. MASTER AND SERVANT, 7, 10, 13, 27. RAILROADS, 16, 17. TRIAL, 5–7.

DECEIT. See FRAUD.

DECLARATIONS. See DEDICATION, 2, 4. FRAUDULENT CONVEYANCES, 5. PARTNERSHIP, 9.

DEDICATION.

1. Where the amount awarded to the owner in proceedings to condemn land for street purposes was paid and a conveyance taken by the city, a subsequent judgment declaring the condemnation proceedings void does not preclude a resort to such proceedings for the purpose of showing the intent of the city in acquiring the land so conveyed to it. *Knox v. Rochl,* 239

2. When a question of intent is to be determined, subsequent acts and declarations are relevant because they throw light upon the prior acts and declarations, especially where they have been consistently the same. *Ibid.*

3. Although a city cannot directly buy land for a street, it may dedicate for street purposes land which it owns; and where a clear intent to dedicate appears only slight proof of acceptance is necessary, since it will be presumed that the city intends to accept in behalf of the public its own dedication. *Ibid.*

4. The intention of a city to make a certain strip of land owned by it a part of the street is *held* in this case to have been unmistakably shown by the acts of the city. *Ibid.*

DEEDS.

Requisites and validity. See WATERS AND WATERCOURSES, 6.

Same: Delivery.

1. When a father executes and causes to be recorded a deed of his land to his infant child and brings this to the knowledge of

the child, and the grant is beneficial to the infant, and the latter thereafter makes claim to the land under the deed, its acceptance is presumed and the delivery is complete. *Jones v. Caird*, 384

2. Such a deed in the ordinary form of a warranty deed, except that after the description of the property was inserted: "This deed is given upon the express condition that the title and possession of the property conveyed is not to pass during the life of the party of the first part, but is to be absolute at his death," is construed to be, not a testamentary disposition, but a grant of the land in fee simple to the grantee, to commence in possession and enjoyment after the death of the grantor, and hence not subject to revocation. *Ibid.*

3. Such being the legal effect of the instrument, oral testimony of the grantor to the effect that he intended a testamentary disposition was incompetent and unavailing. *Ibid.*

Same: Conveyance to take effect at a future time.

4. A conveyance of land in fee to take effect at a future time is valid in this state. *Jones v. Caird*, 384

Construction and operation. See DEEDS, 2. WATERS AND WATERCOURSES.

5. A quitclaim deed in this state is equivalent, at least for the purpose of conveying the title of the grantor, to a deed of bargain and sale. *Home Investment Co. v. Emerson*, 1

6. A quitclaim deed executed by the original owner of land after entry of a default judgment against him in an action to foreclose a tax deed, operated to convey the full title, where the tax deed was in fact invalid and said judgment was afterwards set aside and the action discontinued. *Ibid.*

Same: Recital of consideration not a promise to pay: Implied promises.

7. The mere recital of consideration in a deed, coupled with an acknowledgment of its payment, is some evidence of the amount paid, or to be paid, where the obligation to pay is admitted or otherwise proven; but it may not be evidence at all that the grantee promised to pay that sum. *Gross v. Arians*, 435

8. Assent of the grantee to such a recital may be presumed from his acceptance of the deed, but he does not thereby admit that there was a promise on his part to make future payment. *Ibid.*

9. Such a recital and the acknowledgment of payment are consistent with the idea that the conveyance was a gift by the grantor to defraud creditors or to hinder, delay, or defraud suitors out of their lawful actions; and the proposition is not controverted, but rather corroborated, by the facts that no note or other evidence of an existing debt was made by the grantee, and that he stated that he had bought the land for the amount named and had paid for it. *Ibid.*

DELIVERY. See DEEDS, 1. INSURANCE, 3. JUSTICES' COURTS, 2.

DEPARTMENT STORES. See PARTNERSHIP.

DEPENDENT CHILDREN. See STATE PUBLIC SCHOOL.

DEPOSITIONS. See TRIAL, 4.

DESCENT AND DISTRIBUTION.

Ex parte certificate of descent.

A certificate of survivorship, issued by the county court upon petition of the grantee of land, recited the death of the grantor's husband and that thereupon all his right, title, and interest in the land vested in the grantor, and further recited that said grantor had conveyed the premises to the petitioner and that the petitioner "is now the owner in fee simple" thereof. *Held*, that such last recital is not *res judicata* or conclusive against said grantor, she not being in any sense a party to the proceeding, although she testified, on the hearing, as to the date of her husband's death. *Krueger v. Buel*, 583

DIRECTING VERDICT. See HUSBAND AND WIFE. NEGLIGENCE, 1.

DISBARMENT. See ATTORNEYS AT LAW.

DISCOVERY. See EVIDENCE, 6. STREET RAILWAYS, 2. WITNESSES, 5.

DISCRETION. See APPEAL, 6. TRIAL, 1, 11–14.

DISMISSAL AND NONSUIT. See APPEAL, 6. EQUITY.

DISTRICT COURT OF MILWAUKEE COUNTY. See APPEAL, 15–19.

DIVORCE.

Alimony, when awarded. See JUDGMENT, 8.

1. If there has been no marriage there can be no alimony. *Becker v. Becker*, 226

Same: Misconduct of wife after judgment: Modifying judgment. See JUDGMENT, 1.

2. Misconduct of the wife occurring subsequent to the entry of the final judgment of divorce may be a sufficient ground for modifying the allowance of alimony. *Weber v. Weber*, 132

3. Upon evidence in this case showing such misconduct of the wife and satisfying the court that she evinced a permanent disposition to err, a modification of the judgment so as to provide for a final division of the property, instead of alimony, was proper. *Ibid.*

4. Where such modification of the judgment was made by the trial court upon the basis that alimony for three months, then in arrears, should be paid by the husband in addition to the sum he was required to pay in the division of his property, a subsequent order requiring payment of such past-due alimony was proper. *Ibid.*

DOCUMENTARY EVIDENCE. See EVIDENCE, 6.

DRAWBRIDGES. See MUNICIPAL CORPORATIONS, 4. NAVIGABLE WATERS

DUE PROCESS OF LAW. See STATE PUBLIC SCHOOL.

ELECTION OF REMEDIES. See APPEAL, 8.

EMINENT DOMAIN. See DEDICATION.

EMPLOYERS' LIABILITY ACT. See RAILROADS, 26–28. WORKMEN'S COMPENSATION.

EQUITY.

See APPEAL, 6. CORPORATIONS, 6, 7. ESTOPPEL. FRAUDULENT CONVEYANCES. JUDGMENT, 2, 3. LIMITATION OF ACTIONS, 1, 2. PARTIES. PARTNERSHIP. SALES. VENDOR AND PURCHASER. WILLS.

A court of equity has very broad power in respect to disposing of the entire controversy appearing from the pleadings and evidence, whether legal or equitable relief, or both, be required; and where an action in equity is brought in good faith, it should not be dismissed upon its appearing that there is no sound basis for other than legal relief, merely because the facts were known to the plaintiff in the beginning, especially where no objection was made by answer or demurrer to the court's dealing with the matter. *Knauf & T. Co. v. Elkhart Lake S. & G. Co.* 306

ESTOPPEL.

See INSURANCE, 5, 6. JUDGMENT, 5.

1. The familiar principle of estoppel *in pais* whereby the title to land of one who has fraudulently induced a person to buy it as the property of another is taken from him and vested in such purchaser, if otherwise, without want of due care on his part, the latter would be pecuniarily injured, applies to the case of an agent of a corporation who, while negotiating the sale of land of the corporation, points out boundaries which include land of his own. *Knauf & T. Co. v. Elkhart Lake S. & G. Co.* 306
2. Estoppel by covenant and estoppel *in pais* are clearly distinguishable, but each, operating in its appropriate sphere, is as effectual as the other to pass the title to real estate. *Ibid.*
3. The doctrine of the transfer of the title to land by estoppel *in pais* does not violate the statute of frauds, which is the weapon of the written law to prevent fraud, not an instrumentality to enable the evil-disposed to perpetrate fraud. *Ibid.*

EVIDENCE.

Judicial notice.

1. That the great railroad systems of the state are continuously engaged in both interstate and intrastate commerce is matter of common knowledge. *Gray v. Chicago & N. W. R. Co.* 637

Presumptions. See APPEAL, 3. DEDICATION, 3. DEEDS, 1, 8, 9. INSURANCE, 3, 7, 9. RAILROADS, 12.

Same: Foreign laws.

2. In the absence of evidence to the contrary, it is presumed that the written law of another country is the same as our own. *State Bank of West Pullman v. Pease,* 9
3. The mere introduction of a volume of statutes of another country for the purpose of identification, goes no further than the particular purpose. *Ibid.*
4. To make proof of the negative in one country, as to the written law thereof being the same as that of another, by the use of the bound volume of its statutes, it should, at least, be offered in evidence for the specific purpose of showing that it contains no such enactment. The better way would be for the one who has familiarized himself with the matter to testify that the volume

does not contain any such law, and in the absence of some such definite evidence, a trial court will not be condemned for deciding a controversy respecting the matter upon the presumption aforesaid. *Ibid.*

5. When the decisions of another state are offered in evidence to prove the law of that state, the point decided is what is proven as law, and not the matters advanced by way of argument or illustration. *Ruck v. Chicago, M. & St. P. R. Co.* 158

Burden of proof. See INSURANCE, 9. WILLS, 5–7, 14.

Admissions. See DEEDS, 8. INSURANCE, 8. MASTER AND SERVANT, 27. STREET RAILWAYS, 1. TRIAL, 4. WITNESSES, 2.

Declarations. See DEDICATION, 2, 4. FRAUDULENT CONVEYANCES, 5. PARTNERSHIP, 9.

Documentary evidence: Production and inspection.

6. A witness who was subpœnaed to appear before a court commissioner and produce the engineer's report of an accident and the books of defendant showing what kind of air-brake apparatus was used on defendant's train, testified that he knew nothing about the air-brakes, had no access to any books pertaining to them, did not know whether the defendant had records showing what kind of air-brake apparatus was in use on the day of the accident, and knew nothing about the report of the accident or whether defendant had such report. *Held*, that there was no error in denying a motion that the witness be required to produce such books and report for plaintiff's inspection. *Langowski v. Wisconsin Central R. Co.* 418

Negative testimony. See NAVIGABLE WATERS, 4.

Circumstantial evidence. See INSTRUCTIONS TO JURY, 1.

Parol evidence affecting writings. See CHATTEL MORTGAGES, 3, 4. DEEDS, 3.

7. Mere conversations and negotiations which are presumed to have been embodied in a subsequent written contract are not admissible in evidence when it is sought thereby, not to explain the contract, but to vary it. *Greene v. American M. Co.* 216

Opinion evidence: Effect.

8. Medical testimony, in a personal injury case, to the effect that an injury such as plaintiff received is likely to induce or incite tuberculosis by reducing the natural resistance of the patient, does not suffice to establish a causal relation between the physical injury and tuberculosis shown to have existed more than a year later. *Gray v. Chicago & N. W. R. Co.* 637

9. But when to this testimony is added the positive opinion of plaintiff's family physician, who was in a position to judge of the actual as well as probable effects of the injury upon plaintiff, to the effect that the tubercular condition is the result of the injury, it cannot be said that a finding of the existence of such causal relation is purely conjectural. *Ibid.*

Weight and sufficiency. See APPEAL, 7–17. BILLS AND NOTES, 6. DEEDS, 7–9. EVIDENCE, 3–5, 8, 9. FRAUD, 5. FRAUDULENT CONVEYANCES, 2, 6, 7. GIFTS. INSURANCE, 1–3. MASTER AND SERVANT, 7, 13. MUNICIPAL CORPORATIONS, 3. NAVIGABLE WATERS, 3, 4. PARTNERSHIP, 4. RAILROADS, 14, 15–18, 24. RAPE, 1, 2. STREET RAILWAYS, 1. VENDOR AND PURCHASER, 1. WATERS AND WATERCOURSES, 6. WILLS, 18.

EXCEPTIONS. See APPEAL, 4. TRIAL, 2.

EXCESSIVE DAMAGES. See APPEAL, 13. DAMAGES, 2–5. TRIAL, 17.

EXECUTIONS: Stay. See APPEAL, 16–18.

EX PARTE PROCEEDINGS. See DESCENT AND DISTRIBUTION.

EXPERT TESTIMONY. See EVIDENCE, 8, 9.

FACTORS. See AUCTIONS AND AUCTIONEERS, 1.

FALSE REPRESENTATIONS. See FRAUD. SALES, 1, 2.

FELLOW-SERVANTS. See MASTER AND SERVANT, 16, 26–29.

FORECLOSURE. See CHATTEL MORTGAGES, 7. CORPORATIONS, 4, 6. JUDGMENT, 2, 3.

FOREIGN CORPORATIONS. See CORPORATIONS, 2–7.

FOREIGN JUDGMENTS. See JUDGMENT, 8.

FOREIGN LAWS. See EVIDENCE, 2–5.

FORFEITURE. See INSURANCE, 5, 6. PARTNERSHIP, 5, 6, 8–11.

FRAUD.

False representations. See ESTOPPEL, 1, 3. FRAUDULENT CONVEYANCES. SALES, 1, 2.

1. Representations made by the vendor of stock in a creamery company, to induce its purchase, as to the amount of business done at the creamery, the competition in that locality, and the price received for manufacturing butter, do not relate to matters obvious upon inspection or equally open to both parties, but are such as a purchaser, although he may have visited and inspected the plant pending the negotiations, has a right to rely upon. *Baker v. Becker*, 369

2. A complaint alleging in substance that plaintiff was injured while in the employ of a concrete company through its negligence and that it was liable to him for such injury; that the defendant had insured said concrete company against claims for such injuries; that immediately after the accident defendant, through physicians and others, took charge of plaintiff, sent him to a hospital, and attempted to cure him; that while plaintiff was under the control of the defendant, its agents and servants, defendant through its agents and servants falsely and fraudulently represented that plaintiff would be on his feet and ready and able to go to work in five months after the time of the injury, that the injuries were not permanent and would not permanently disable him, and that if plaintiff would sign a release of the concrete company and accept a certain sum defendant would in addition pay all expenses, hospital and doctors' bills until plaintiff was recovered; that relying upon said representations plaintiff signed the release; that said representations were false; that the injuries caused plaintiff to be permanently disabled; and that since signing the release plaintiff has lost his rights against the concrete company by reason of its becoming insolvent,—is *held* on demurrer to state a cause of action. *Brown v. Ocean A. & G. Corp.* 196

3. It is a legitimate inference from these allegations that the misrepresentations as to the extent of plaintiff's injuries were made on the authority of the physicians in charge having special knowledge and capable of making accurate statements on that subject, and they must therefore be regarded as representations of existing facts, upon which plaintiff had a right to rely. *Ibid.*

4. The gravamen of the cause of action being deceit, it was unnecessary for plaintiff in his complaint either to affirm or disaffirm the settlement which was induced by the fraud of defendant. He might retain the money received and proceed to recover damages for the fraud. *Ibid.*

Findings sustained by the evidence.

5. Findings by the jury that a sale of nine horses by defendant to plaintiff did not include the three horses for nondelivery of which the action is brought; that when he signed a note for the price and a chattel mortgage of the horses purchased, plaintiff was not so intoxicated as to be incapable of understanding the transaction; and that he knew, at the time, what horses were described in the mortgage, are *held* to be sustained by the evidence. *Gunsten v. Green*, 413

FRAUDS, STATUTE OF. See ESTOPPEL, 3.

FRAUDULENT CONVEYANCES.

1. A conveyance of real property by an insolvent debtor, which the plaintiff seeks to have set aside on the ground that it was fraudulent as to creditors, is *held* to have been free from fraud, either actual or constructive. *Plewa v. St. Josaphat's Cong.* 276

2. The fact that such conveyance was not made in compliance with the statute (sec. 1694, Stats.) governing voluntary assignments for the benefit of creditors, did not render it void. *Ibid.*

3. A conveyance of a farm by the owner and his wife to their sons in consideration of maintenance of the parents so long as they should live, reserved to said owner mineral and timber rights in the land. The husband also had other property, not shown to have been insufficient to cover his indebtedness at that time. Subsequently, in an action for divorce, the court awarded to the wife all the right, title, and interest which the husband had in the farm so conveyed. Afterwards a creditor obtained judgments upon notes given by the husband prior to said conveyance, and then brought action to set aside the conveyance as fraudulent and to subject the land to the lien of his judgments. *Held* that, there having been no fraud in the divorce proceeding, the wife cannot be deprived of the interests awarded to her, and hence that the creditor could not subject the land to the lien of his judgments. *A. D. Baker Co. v. Booher*, 319

4. Even if the conveyance to the sons was in fraud of creditors, the wife's participation therein did not deprive her of all her marital rights and claims to the property or affect her right to a final division of the husband's estate in the divorce action; and the judgment in that action must be treated as final so far as it is involved in the action by the creditor. *Ibid.*

5. The question being whether a sale of personal property to defendant was void under sec. 2320, Stats., because made with

intent to defraud the plaintiff, evidence of statements made by the vendor before the transfer, tending to prove a fraudulent intent on his part, was admissible for that purpose, although the statements were not made in defendant's presence. *Gilpin v. Matchett*, 347

6. Findings by the jury in such case that at the time he bought the property defendant had notice of the vendor's fraudulent intent and also of an unfiled contract for the sale of the property by plaintiff to said vendor by the terms of which the title was to remain in the plaintiff, are *held* to be supported by the evidence. *Ibid.*

7. Actual knowledge on defendant's part of his vendor's fraudulent intent or of plaintiff's title need not be shown in such a case, it being sufficient to show that he had knowledge which should have put him upon inquiry and that such inquiry would have led to discovery of the facts. *Ibid.*

GAMING. See CARRIERS, 3, 4.

GENERAL APPEARANCE. See APPEAL, 20.

GIFTS.

Inter vivos. See DEEDS, 9.

In an action between the personal representatives of a husband and wife, both deceased, involving the ownership of certificates of deposit payable to the wife, the evidence (stated in the opinion), tending to show that she had possession of such certificates and that the money represented thereby might have been given to her by the husband, is *held* to sustain the finding of the trial court that the certificates were her separate property and belong to her estate. *McNelly v. Marshall*, 333

GOOD WILL. See PARTNERSHIP, 11.

GRADE CROSSINGS. See RAILROADS, 7–15.

GROSS NEGLIGENCE. See NEGLIGENCE, 2, 3. RAILROADS, 10, 12–14, 18, 19, 21.

HABEAS CORPUS.

Error in dismissing the appeal of a convicted person is not available on writ of *habeas corpus*. *State ex rel. Kassner v. Momsen*, 203

HIGHWAYS.

Town-line roads: Apportionment: Reapportionment or division of town: Bridges.

1. An order apportioning a town-line highway between two adjoining towns for maintenance is abrogated by a division of one of such towns and the creation of a new town out of that part thereof which lies adjacent to the highway. *Seif v. Eaton*, 657

2. In such a case, sec. 1273, Stats., provides for a new apportionment of liabilities in respect to the highway by agreement of a majority of the supervisors of each town, or, failing that, by a different method, the whole scheme indicating a purpose to avoid a divided responsibility respecting maintenance thereof. *Ibid.*

3. To make a valid reapportionment of the highway, no board action of the respective towns is required, nor need the meeting of the supervisors be upon notice specifying its particular purpose. The meeting contemplated by the statute is neither a general nor a special one of the respective town boards, but is a joint meeting of at least a majority of the supervisors of each town, with authority, if they agree, to bind both towns by their order. *Ibid.*

4. In making such new apportionment the supervisors have nothing to do with the original order, which is vacated by force of the statute, and no notice is required of a purpose to change it. *Ibid.*

5. Whether or not an oral agreement between the supervisors, not formulated in an order, would be binding on the towns if objected to before expenditure of money thereunder, *it seems* that to the extent of its mutual observance it would be binding. *Ibid.*

6. Where, pursuant to such an oral agreement, one town for several years maintained a certain portion of the highway and then undertook to rebuild a bridge therein, the fact that the chairman of the adjoining town, as a member of the county board, was instrumental in securing county aid toward the construction of such bridge, did not tend to establish the liability of his town to contribute to the expense, but rather the reverse. *Ibid.*

7. Even if there were a joint duty on the part of two adjoining towns to repair or rebuild a bridge upon a town-line road, the mere fact that one has voluntarily solely performed such duty does not render the other liable to repay any part of the expense. Such liability arises only where there has been a previous refusal to join in the burden. *Ibid.*

8. Mere use by the public of a town-line bridge so built at the expense of one town is not such an appropriation and beneficial use of it by the adjoining town as would render it liable to pay any part of the cost. *Ibid.*

Injuries from defects and obstructions. See MUNICIPAL CORPORATIONS, 1–4.

HOISTING APPARATUS. See MASTER AND SERVANT, 17.

HOMICIDE.

1. The fact that an officer does not act technically within his rights in making an arrest without warrant, furnishes no justification or excuse to the persons arrested, having knowledge of his official character, for committing a homicide in order to effect an escape. *Imperio v. State,* 455

2. Where two persons fleeing together from arrest were apprehended by an officer, and while being held in custody one, in an attempt to escape, drew a revolver and fired upon and killed the officer, while his companion, evidently knowing his purpose, actively aided in effecting it although he used no weapon there was no error in instructing the jury not to convict the latter of any less offense than the one who fired the fatal shot. *Ibid.*

HUSBAND AND WIFE.

Conveyances and transactions between husband and wife. See GIFTS.

Disabilities and privileges of coverture. See WITNESSES, 1–4.

Wife's separate estate. See GIFTS.

Separation and separate maintenance. See WITNESSES, 1–3.

Criminal conversation.

In an action for alienation of a wife's affections and for criminal conversation, the direction of a verdict in defendant's favor was error, because different inferences could legitimately be drawn from the evidence and the jury would have been warranted in returning a verdict thereon for plaintiff. *Turner v. Learman,* 547

IMPEACHMENT. See JURY, 2.

IMPLIED AUTHORITY. See BILLS AND NOTES, 2–5.

IMPLIED PROMISE. See ASSOCIATIONS, 1.

IMPRISONMENT: When term begins. See APPEAL, 17–19.

INCOMPETENT SERVANT. See MASTER AND SERVANT, 27–29.

INCORPORATION. See APPEAL, 6. CORPORATIONS, 1.

INDORSEMENT. See BILLS AND NOTES.

INFANTS. See DEEDS, 1. STATE PUBLIC SCHOOL.

INQUEST. See INSURANCE, 8.

INSTRUCTIONS TO JURY.

Request for instructions. See MASTER AND SERVANT, 5. RAPE, 5.

Assault with intent to commit rape. See RAPE, 3.

Assumption of risk. See MASTER AND SERVANT, 5.

Circumstantial evidence.

1. Refusal to give requested instructions as to circumstantial evidence was not prejudicial error where the evidence in the case was largely direct and positive and there was no need for the jury to resolve any issue upon circumstantial evidence alone. *Quinn v. State,* 573

Collision. See NAVIGABLE WATERS, 3

Damages. See TRIAL, 10.

Gross negligence. See RAILROADS, 21.

Homicide. See HOMICIDE, 2.

Personal injuries: Future suffering.

2. Where the evidence tended to show that at the time of the trial plaintiff was still suffering from the injury, it was proper to instruct the jury as to damages recoverable for future suffering. *Baermann v. Chicago & M. E. R. Co.* 235

Trespassers. See RAILROADS, 19–21.

Witnesses. See RAILROADS, 20.

INSURANCE.

LIFE.

Transfer of interest in policy: Delivery of duplicate assignment to company: Retention of policy by insured: Presumptions.

1. Under evidence relative to assignment of a life insurance policy, stated in the opinion, it is *held* that there was a complete transfer of title according to the terms of the assignment. *Northwestern Mut. Life Ins. Co. v. Wright*, 252

2. Retention of the policy in such case was not inconsistent with a transfer of title, being well explained by the fact that an interest was retained by the assignor. *Ibid.*

3. Delivery of the written evidence of the assignment to the insurance company, with intent to transfer a right to a part or all of the insurance, was a good delivery to the assignees, their acceptance being presumed from the beneficial character of the transaction. *Ibid.*

4. The insurance itself, not the mere policy or evidence of it, is the subject dealt with in such a transaction. *Ibid.*

Benefit societies: Prohibited occupations: Forfeiture: Waiver: Estoppel.

5. A benefit certificate issued by defendant became void when the insured became a paid fireman, but assessments continued to be paid to the secretary of the local lodge. Under the evidence, stated in the opinion, it is *held* that there was no waiver or estoppel preventing defendant from setting up a forfeiture because of change of occupation. *Jones v. Modern Brotherhood*, 223

6. The furnishing by defendant of blank proofs of loss in such a case and the making of such proofs by the beneficiary did not operate as a waiver of the forfeiture, it being expressly provided in the contract that they should not have that effect. *Ibid.*

Mutual benefit insurance: Presumption against suicide: Admissibility of coroner's verdict.

7. Where death occurs under such circumstances that it may or may not have been caused by suicide, it will be presumed to have been unintentional. *Krogh v. Modern Brotherhood*, 397

8. Where a certified copy of the verdict at a coroner's inquest was not furnished as a part of the proof of death, as required by a certificate of insurance, but such a copy was attached to the notification of death sent to the insurer by its agents, the claimant having had nothing to do with it and knowing nothing about it, such copy could not be received in evidence against the claimant as being an admission against interest. *Ibid.*

Same: Amount recoverable: Presumption as to what one assessment will produce.

9. Where, upon death of the insured, a mutual benefit certificate entitles the beneficiary to share in the mortuary fund to the amount of one full assessment on all members in good standing, not to exceed a certain sum, it will be presumed that one assessment would equal the maximum sum so named, and the burden of showing the contrary rests upon the insurer. *Krogh v. Modern Brotherhood*, 397

INTEREST IN LAND. See CORPORATIONS, 2.

INTERSTATE COMMERCE. See CARRIERS, 2. COMMERCE. EVIDENCE, 1. RAILROADS, 26–28.

INTOXICATING LIQUORS.

Licenses: Statute construed.

Sec. 1565*d*, Stats. (Laws of 1907, ch. 484), does not give to the owner of premises which were under license for saloon uses on June 30, 1907, the power, by refusing to lease such premises to any aspirant for a license, to make that aspirant eligible to receive a license although he has never occupied the premises for saloon purposes and the ratio limit fixed by the section has already been exceeded. The proviso in said section means that, notwithstanding the ratio limit, the owner of property under license for saloon purposes on June 30, 1907, may by himself or his tenant continue its use for such purposes (if properly licensed) thereafter, and any person in possession of such premises as lessee on said date, if thereafter deprived of opportunity to continue their use by refusal of the owner to lease for such purposes, by destruction of the building by fire or the elements, or by the operation of other provisions of the law (*e. g.* the establishment of a no-license area), may, if properly licensed, continue the business at some other location. *State ex rel. Marvin v. Larson*, 488

INTOXICATION. See FRAUD, 5. RAPE.

JUDGMENT.

Opening, vacating, and modifying. See ATTORNEYS AT LAW, 3, 6. DIVORCE, 2–4. JUDGMENT, 2, 3.

1. A circuit court has full control of its judgments (including judgments for divorce) during the term within which they are rendered, and may vacate or modify the same at any time during the term, with or without a motion therefor by the parties thereto or those affected thereby. *Weber v. Weber*, 132

Collateral attack.

2. An order in the foreclosure action setting aside the judgment and allowing the defendant to answer and contest the case is not open to collateral attack in a subsequent action to quiet title brought by said defendant's grantee. *Home Investment Co. v. Emerson*, 1

3. Although said defendant, the original owner, had conveyed the land before applying to have the foreclosure judgment vacated, he might still, under sec. 2801, Stats., be permitted to answer and defend in that action. *Ibid.*

Conclusiveness of adjudication. See DESCENT AND DISTRIBUTION.

4. Where the rights of the grantor of a residuary interest in a water power had been adjudicated prior to the grant, his grantee, being in privity with him, is bound by the decree. *Kimberly-Clark Co. v. Patten Paper Co.* 69

5. But as to a grant of a partial interest in such water power made by the same grantor, prior to the decree, to one who did not become a party to the suit in which that decree was made, al-

though such interest finally vested by mesne conveyances in the grantee of such residuary interest and the water taken under both grants was commingled in use at its mill, such residuary grantee is not estopped nor conclusively bound by the decree. *Ibid.*

6. In judgments or decrees which do not determine status, but relate to property rights or interests, privies are those who succeed to the ownership of that property, or some right or interest therein, under one of the parties to the litigation. *Ibid.*

7. If in two actions between the same parties the issues involved are the same, a determination of such issues in one action will be *res judicata* in the other. *Baker v. Becker*, 369

Lien. See FRAUDULENT CONVEYANCES, 3.

Foreign judgment: Divorce: Alimony.

8. Where an order or decree of a court of competent jurisdiction in another state, made in a contempt proceeding, adjudging that a certain sum is due from the defendant to the plaintiff for arrears of alimony, has the force and effect, under the laws of that state, of a judgment at law for the payment of money, an action at law for its recovery may be maintained in this state. *De Longe v. Fischback*, 193

JUDICIAL NOTICE. See EVIDENCE, 1.

JUDICIAL POWERS. See STATE PUBLIC SCHOOL, 2.

JURISDICTION. See APPEAL, 1–3, 20–22. CARRIERS, 2. CRIMINAL LAW, 1. MUNICIPAL CORPORATIONS, 5. VENUE, 3.

JURISDICTIONAL ERROR. See APPEAL, 6. STATE PUBLIC SCHOOL, 3.

JURY.

Right to trial by jury. See CONSTITUTIONAL LAW.

Impeachment of verdict.

1. Affidavits of jurors, except as to matters outside the jury room or some mistake in framing the verdict so that it does not correctly report what was agreed upon, cannot be used as a basis for setting the verdict aside. *Imperio v. State*, 455

2. Under no circumstances can a juror be permitted to impeach a verdict by affidavit to the effect that while he understood the effect of the verdict he did not, when he agreed thereto, believe it was right. *Ibid.*

JUSTICES' COURTS.

Pleading: Statutes: Instrument for the payment of money only.

1. Although a written contract containing a promise by defendant to pay a definite sum of money to plaintiff on or before a date named contains also a statement of the consideration therefor and other promises, yet in an action in justice's court founded solely upon the promise first mentioned it may be deemed an "instrument for the payment of money only," within the meaning of sub. 9, sec. 3626, Stats.; and the complaint in such action, setting out the contract and alleging that defendant is indebted thereon to plaintiff in the said sum with interest from the date named, is sufficient. *Jelinek v. Baer*, 426

2. Delivery of such contract to plaintiff's agent, thence to plaintiff, and retention thereof by the latter and his bringing suit thereon constituted a sufficient acceptance by plaintiff, although the instrument was not signed by him. *Ibid.*

LACHES. See LIMITATION OF ACTIONS, 2.

LEGISLATIVE POWERS. See CONSTITUTIONAL LAW. MASTER AND SERVANT, 1, 2. PUBLIC UTILITIES, 3, 4. RAILROADS, 1–7.

LICENSES. See ATTORNEYS AT LAW, 3–6. INTOXICATING LIQUORS.

LIENS. See CHATTEL MORTGAGES, 5. FRAUDULENT CONVEYANCES, 3.

LIFE INSURANCE. See INSURANCE.

LIMITATION OF ACTIONS.

Limitations applicable to peculiar conditions.

1. In an equitable action between two of the grantees of separate interests in a water power, to determine their respective rights and to restrain invasion of plaintiff's rights, where both parties were using the water as of right, and the injury consisted in one continuing from day to day to use more than his proper share, each taking only the water as it flowed by for the creation of power, and the volume fluctuated so that at times the utmost use by either did not exceed his right and at other times the volume was so small that the use by one did encroach upon and impair the right of the other, no statute of limitations or adverse possession will bar the action to redress such wrong. *Kimberly-Clark Co. v. Patten Paper Co.* 69

2. So, also, where the defendant in such action interposes a counterclaim alleging similar wrongs on the part of the plaintiff and asking affirmative relief, thereby opening up the whole subject of the several grants for equitable consideration and decision, neither the defense of limitation nor that of laches will avail him. *Ibid.*

Computation of period of limitation: Accrual of right of action: Conflict of laws. See CORPORATIONS, 3.

3. If the place of a contract is in one country and judicial enforcement of it be sought in another, the statute of limitations of the latter applies, unless the contract right shall have been previously extinguished by the law of the former. *State Bank of West Pullman v. Pease,* 9

4. The statute of limitations of a country, existing at the time of the making of a contract therein, does not inhere in such contract and go with it, under the rule that the *lex loci contractus* governs as to the nature, validity, and interpretation of a contract unless the mutual intention of the contracting parties at its inception was otherwise. *Ibid.*

5. The statute of limitations has reference to the remedy and falls within the principle that the law of the forum governs in respect thereto. *Ibid.*

6. So long as a contract has existence under the law of the place thereof, it is enforceable in the forum of any other country unless its limitation laws would afford a defense. *Ibid.*

7. In case the limitation laws of the place of a contract bear on the remedy without extinguishing the contract right, it is en-

forceable in another country where, if such were the place thereof, a remedy would be afforded, otherwise not. *Ibid.*

8. In case the limitation laws of the place of a contract bear on the remedy and in time extinguish the right, it is not enforceable in another country, regardless of its own statute of limitation. *Ibid.*

Same: Payment by one joint contractor.

9. By force of sec. 4248, Stats. 1911, payment upon a contract by one of two joint makers does not affect the running of the statute of limitations as to the other. *State Bank of West Pullman v. Pease,* 9

Same: Pendency of legal proceedings.

10. Under sec. 4250, Stats., a tax deed was not protected by the statute of limitations where, although more than three years had elapsed from the time of its being recorded, an action for its foreclosure was at issue and pending during the greater part of that time and was afterwards discontinued. *Home Investment Co. v. Emerson,* 1

11. Said sec. 4250 relates to any defense which might also serve as a cause of action, hence is applicable in cases of contested title. *Ibid.*

12. Although literally said sec. 4250 might appear to be personal to "a defendant," yet, since it is a remedial statute and should be construed liberally, one who was not named as a defendant in an action to foreclose a tax deed, but purchased the land after *lis pendens* filed and was therefore bound by the proceedings "to the same extent and in the same manner as if . . . a party thereto," is entitled to the remedies afforded by the statute. *Ibid.*

Operation and effect of bar of limitation. See ADVERSE POSSESSION.

MACHINERY. See MASTER AND SERVANT, 3–18. TRIAL, 5–7.

MARRIAGE.

See DIVORCE.

An oral contract of marriage made between competent parties *per verba de præsenti*, although without witness or ceremony of any kind, if consummated by cohabitation and corroborated by holding themselves out to the public as husband and wife, is a valid and binding marriage. *Becker v. Becker,* 226

MASTER AND SERVANT.

Master's liability for injuries to servant. See COMMERCE. RAILROADS, 23–25. WORKMEN'S COMPENSATION.

Same: Nature and extent: Power to regulate by statute: To whom applicable.

1. It is within the power of a state to regulate the relation of master and servant, where both are within the jurisdiction of the state and the contract of employment is made therein, and to fix (as is done by sec. 1816, Stats.) the liabilities as between them with respect to negligent injuries arising out of or incident to such contract of employment, whether occurring within

or without the state, provided the employee so injured without the state is there on the business of the employer and pursuant to the contract made in this state. *Ruck v. Chicago, M. & St. P. R. Co.* 158

2. "Employees working in shops and offices," to whom the provisions of sec. 1816, Stats., are declared not to be applicable, include all of the class employed for shop or office work, although outside of the shop or office at the time of the injury. *Ibid.*

Same: Defective machinery.

3. Plaintiff, an employee in defendant's matting factory, was injured while baling dried swamp grass with a hay-press. He testified that a lever used in operating the press had been broken and twice repaired by defendant's foreman; that at the time of the last repair the foreman assured him that it was all right and directed him to continue work; and that three days later, while he was pulling this lever, it gave way, causing him to lose his balance and fall against the machine in such a way that his arm was caught and injured. Upon conflicting evidence which defendant claimed to show that it was physically impossible that the accident could have happened in that way, it is *held* that it was a question for the jury whether plaintiff sustained his injuries substantially in the manner described by him. *Novitski v. Waite G. C. Co.* 266

4. In such case the repair by the foreman and the direction to continue work with the machine as repaired were equivalent to an assurance of safety and went to excuse plaintiff's return to and continuance of work notwithstanding his knowledge of the former defect. *Ibid.*

5. The questions of contributory negligence and assumption of risk in such case were so closely related that there was no prejudicial error in refusing to submit a separate question as to the latter in the special verdict, where the court instructed the jury concerning assumption of risk in that part of the charge relating to defendant's negligence, but was not requested to and did not instruct upon that subject in the part relating to contributory negligence. *Ibid.*

Same: Unguarded machinery. See TRIAL, 5–7.

6. An employer upon whom the statute imposes the duty of securely guarding shafting which is so located as to be dangerous to employees cannot evade such duty, as to a subordinate employee, by a mere direction to him, given through a superintendent or foreman, to assist in erecting or assembling the machinery in question, in the erection or assembling of which other employees superior to him in authority are also engaged at the time. *Herning v. Holt L. Co.* 101

7. In an action for death of an engineer which resulted from his being caught on an unguarded shaft connected with a stationary engine, the evidence is *held* to sustain a finding by the jury that defendant did not intrust to the decedent the duty of getting the engine and its attachments in proper condition for use. *Ibid.*

8. The mere fact that an employee had an opportunity on his own initiative to devise and place a guard upon an exposed shaft is

not sufficient to relieve the employer from liability for injury sustained by such employee as a consequence of the shaft being unguarded. *Ibid.*

9. A special verdict finding, among other things, that the unguarded shaft by which an employee of defendant was injured was so located as to be dangerous to defendant's employees in the discharge of their duty while using ordinary care, and negativing contributory negligence, is *held* sufficient, although there was no specific finding of defendant's negligence or of proximate causation. *Ibid.*

10. Whether or not the plaintiff's intestate, who was fatally injured as a result of being caught on a revolving shaft connected with a stationary engine which he was engaged in lubricating, was guilty of a want of ordinary care in failing to stop the engine before attempting to apply the lubricant, is *held* in this case to have been a question for the jury. *Ibid.*

11. The knives in a machine used to trim and plane the edges of boards are *held* in this case to have been securely guarded, within the meaning of sec. 1636*j*, Stats. *Montevilla v. Northern F. Co.* 292

12. Where employees are expected and required at times to ascend upon a staging and work in close proximity to a line shaft while in motion, such shaft, though elevated nearly fourteen feet above the floor, is within the provisions of sec. 1636*j*, Stats., requiring the guarding of all shafting so located as to be dangerous to employees in the discharge of their duties. *Nickels v. Manitowoc S. & D. D. Co.* 298

13. In an action for the death of an employee who was caught on such a line shaft, evidence that line shafting of the same general nature in other shops was not usually guarded, was neither controlling nor of much weight, where it appeared that in such shops employees were not expected, in the course of their duties, to approach the shafting while in motion. *Ibid.*

14. Sec. 1636*j*, Stats., was intended to protect the health and safety of employees in factories, workshops, and manufacturing establishments; and the phrases "or other place where labor is performed" and "every place where persons are employed to perform labor" were intended to embrace places of the same general character as those enumerated. Such phrases do not include a threshing machine as a "place," within the meaning of the statute. *Chapman v. Piechowski*, 356

15. In an action for injury sustained by plaintiff while working in defendant's planing mill, the evidence—which tended to show, among other things, that in the discharge of his duty plaintiff got down on his knees under a lath machine to clear out a blower pipe, and while so engaged the machine was started by another employee; that as plaintiff raised himself up to get out of the way his sleeve was caught by the nut or burr on the end of the shaft upon which the saws were located, and was wound up so that his arm went into the saws; that as he raised himself up his arm came over to the end of the shaft and he knew the burr caught him because he felt a jerk and twist from it; and that there were sharp and jagged leaves of metal curled up on the burr, caused by the use of a cold chisel in taking off and tightening it—is *held* sufficient to sustain find-

ings by the jury that plaintiff's arm was drawn into the saws in consequence of his clothing being caught by the jagged surface of the burr. and that defendant's failure to securely guard the end of the shaft was the proximate cause of the injury. *Smith v. Winnebago R. Co.* 469

16. Since, under the circumstances, the injury would not have happened but for the failure to guard the shaft, the fact that negligence of a fellow-servant concurred will not defeat recovery. *Ibid.*

Same: Hoisting apparatus.

17. Plaintiff, a carpenter employed by defendant, was engaged with others in raising heavy beam joists to the third story of a building by means of a hoisting apparatus consisting of a block and tackle attached to a so-called horse, the legs of which rested upon planks lying upon and projecting a little in front of the joists already set in place. As he stood waiting to receive a joist which the men below were so raising, one of the planks upon which the horse rested tilted up at the rear, swung around, and knocked him from the timber on which he was standing, so that he fell to the ground and was injured. Upon the evidence it is *held* that the question of plaintiff's contributory negligence or assumption of the risk was one for the jury. *Van Dinter v. Worden-Allen Co.* 533

Same: Simple tools.

18. A punch, used in cutting rivets on a boiler, while simple in form, was not simple with reference to its resisting qualities or with reference to the results of using it with the end battered or burred; and it could not, under the circumstances stated in the opinion, be said to be a simple tool. *Ruck v. Chicago, M. & St. P. R. Co.* 158

Same: Places to work: Safe tools.

19. The rule requiring the employer to furnish the servant a safe place to work has no proper application to such operations as building, mining, or the like, where the working place is constantly changing and the servant is assisting in making the change himself. *Jakopac v. Newport Mining Co.* 176

20. The benches and irregularities of surface in a quarry being the necessary result of its operation, the rule requiring the master to furnish a safe working place is inapplicable; and the accident not having been caused by any defect in the drill or appliances, the rule requiring the furnishing of safe tools and appliances has no application. *Richter v. Union L. Co.* 261

21. No negligence of defendant in failing to furnish sufficient men was shown, it appearing that four men were enough to move the drill, that it was usually moved by three, and that other men were near by who might be and customarily were called when necessary. *Ibid.*

Same: Rules and regulations.

22. It appearing that the drillers had adopted proper methods for moving the drills in the quarry and that there was no occasion for any different rules, defendant could not be held liable on the ground of a failure to promulgate proper rules and regulations. *Richter v. Union L. Co.* 261

Same: Warning servant. See MASTER AND SERVANT, 6, 7. PLEADING. TRIAL, 18.

23. A master's duty to warn a servant is fulfilled when the servant is warned as to all risks or hazards that are incident to the employment when carried on in the manner in which the servant is instructed to do the work or in which an ordinarily prudent person may reasonably anticipate it may be done by the servant. *Montevilla v. Northern F. Co.* 292

24. No duty devolves upon the master to warn a servant of dangers which are as obvious to the servant as to the master. *Ibid.*

25. A master is under no obligation to warn a servant of dangers which are open and obvious to a person of the servant's experience and understanding. *Van Dinter v. Worden-Allen Co.* 533

Same: Fellow-servant or vice-principal. See MASTER AND SERVANT, 16, 27–29.

26. Plaintiff, a teamster in defendant's stone quarry, having been called to assist a driller and two other employees in moving a heavy drill down an incline or bench in the quarry, and having been injured by the tipping over of the drill, due to the manner in which the four men handled it, no recovery for such injury can be had on the ground that the other men or any of them were negligent, since all were fellow-servants and engaged in the common employment of moving the drill at the time of the accident. The driller was not, under such circumstances, a vice-principal. *Richter v. Union L. Co.* 261

Same: Incompetent fellow-servant.

27. In an action for death of a servant, alleged to have been caused by negligence of the master in retaining in its employ a fellow-servant known to be incompetent, it was not error, after sufficient evidence had been put in to warrant the jury in finding the fact of incompetency, to receive evidence of the reputation of the fellow-servant for incompetency, as bearing upon the question of notice to the defendant, even though it was admitted that defendant's foreman knew of such incompetency. *Serdan v. Falk Co.* 169

28. Where a master negligently retains in his employ an incompetent servant whose incompetency causes an injury, the master's negligence is, as a matter of law, the proximate cause of the injury. *Ibid.*

29. Where a special verdict finds that the incompetency of a fellow-servant was the proximate cause of the injury complained of, and also that defendant's negligence in permitting such servant to do the work which resulted in such injury was the proximate cause thereof, the latter finding controls and entitles the plaintiff to judgment. *Ibid.*

Same: Assumption of risk. See MASTER AND SERVANT, 4, 5, 8, 17, 30–33.

30. In the absence of statutory provision an adult servant assumes the ordinary risks of his employment, and where he enters upon a task attended by dangers which are just as obvious and apparent to him as to the master, this rule applies notwith-

standing an assurance by the master or his representative that there is no danger. ***Jakopac v. Newport M. Co.*** **176**

31. But if the employee has no actual knowledge of the danger, and it is not obvious to the sense but only to be ascertained by careful examination or test, and the master or his representative having superior knowledge of the situation, or assuming to have, assures the employee of safety, and the latter, relying on such assurance, goes to work, he will not be held as matter of law to have assumed the risk. *Ibid.*

32. Plaintiff, a trammer in defendant's mine, was injured by the falling of ore from the roof of a drift. The shift boss had gone into the drift with his candle, and upon coming out had ordered plaintiff to go in and shovel, telling him the place was as safe as his home. It would have taken some examination of the roof with the aid of a light to ascertain what the condition was. *Held*, that it was a question for the jury whether plaintiff was excused from making such examination for himself. *Ibid.*

33. Where plaintiff claimed that he was assured by defendant's shift boss that the place where he was directed to work was safe, and the evidence was such that the jury might find that he had a right to rely upon such assurance, it was proper to permit him to testify to the fact of such reliance. *Ibid.*

Same: Contributory negligence.

34. Plaintiff, the operator of a barking machine in defendant's mill, instead of using a stick with which he might safely have dislodged the refuse material which clogged a spout leading from the knives of the machine, thrust his hand into the spout so far that it came in contact with the revolving knives and was injured. The jury having, upon sufficient evidence, negatived his claim that defendant's foreman had assured him there was no danger in cleaning the spout by hand, the trial court properly held that plaintiff was, as a matter of law, guilty of contributory negligence. *Strosin v. Wis. River P. & P. Co.* 409

Liabilities for injuries to third persons: Tortious acts of servant.

35. When a servant is engaged in the performance of a duty delegated to him by the master, his tortious acts within the scope of his employment, though unlawful, unauthorized, or even forbidden, are binding upon the master. *Ratcliffe v. Chicago, M. & St. P. R. Co.* 281

36. A switch through which, under a contract with defendant, the trains of another railway company entered upon the main line of defendant's road was out of repair, and a section man in defendant's employ had been left in charge of it with directions to wait for an expected train on defendant's road. If a train of the other company came while he was there, he was to open the switch and let that train pass upon defendant's track. He opened the switch to see if the connection rod was broken, and while it was so open a train on defendant's road ran through it and upon the track of the other company, where it struck an engine of the other company and injured the engineer. *Held*, that such act of the section man was within the scope of his employment, and that defendant is liable for the injury. *Ibid.*

MAXIMS.
Certum est quod certum reddi potest, 429.
Ita lex scripta est, 115.
Noscitur a sociis, 361.
Res judicata pro veritate accipitur, 369, 383, 583, 589.
Respondeat superior, 288, 315.
Stare decisis, 71, 89.
Surplusagium non nocet, 430.
Utile per inutile non vitiatur, 430.

MEASURE OF DAMAGES. See CARRIERS, 3, 4. DAMAGES, 1.

MENTAL CAPACITY. See VENDOR AND PURCHASER. WILLS, 18.

MILWAUKEE CIVIL COURT. See APPEAL, 20–22.

MILWAUKEE DISTRICT COURT. See APPEAL, 15–19.

MINORS. See DEEDS, 1. STATE PUBLIC SCHOOL.

MISCARRIAGE. See DAMAGES, 5.

MISREPRESENTATION. See FRAUD.

MONEY RECEIVED.

See CARRIERS, 1.

A common-law action for money had and received is based upon the theory not only of loss to plaintiff but of the consequent enrichment of the defendant, or of someone for whom he may act, by reason of having received more money than he is entitled to. *Siggins v. Chicago & N. W. R. Co.* 122

MORTGAGES.
Requisites and validity. See CORPORATIONS, 4, 6.
Payment and discharge. See PRINCIPAL AND AGENT, 2.
Foreclosure. See CHATTEL MORTGAGES, 7. JUDGMENT, 2, 3.

MUNICIPAL CORPORATIONS.

Legislative control of municipal acts. See PUBLIC UTILITIES, 1–7.

Ordinances. See PUBLIC UTILITIES, 2, 7.

Property. See DEDICATION.

Torts: Defects in sidewalks: Notice. See WITNESSES, 2.

1. Where a sidewalk is so decayed that a plank is liable to break at any time and that condition is observable by reasonable inspection, a city cannot, when a plank does break, escape liability for an injury caused thereby by saying that it had no notice of that particular defect. Actionable negligence is sufficiently shown in such a case if the jury can say under the evidence the break was due to the general bad condition of the walk. *Madison v. Antigo,* 448
2. Plaintiff, who was injured by stepping into a hole in a sidewalk, having testified that her attention was diverted at the time by a passing team of horses, the question of contributory negligence was one for the jury. *Ibid.*
3. In an action against a city for personal injury sustained by reason of an alleged defective sidewalk, findings by the jury to

the effect that the walk was insufficient for public travel, that defendant was charged with notice of its insufficiency, and as to the damages, are *held* to be sustained by the evidence. *Corrigan v. Antigo*, 451

Same: Drawbridge: Negligence of tender. See NAVIGABLE WATERS.

4. The operation of a draw in a bridge forming part of a highway is, as to travelers over it, a part of the maintenance of the highway, and a city performs therein a governmental, not a municipal, function. There is, therefore, no common-law liability of the city for injuries to a traveler over the bridge caused by negligence of the bridge tender in operating the draw. *Evans v. Sheboygan*, 287

Claims: Appeal from disallowance: Sufficiency of bond.

5. Where a city charter requires one taking an appeal from the disallowance of a claim by the council to execute "a bond to the said city with sufficient surety . . . conditioned for . . . the payment of all costs that shall be adjudged against the appellant," a bond executed for a definite sum, if otherwise in accordance with the requirement, is a substantial compliance with the charter and sufficient to confer jurisdiction on the appellate court, provided the sum for which it is given is large enough to secure payment of any judgment for costs which, in the ordinary course, the city might obtain. *American C. M. Co. v. Madison*, 444

6. If, in such a case, an unusual contingency arises causing an amount of costs in excess of the bond to be incurred, recoverable by the city, the court, under sec. 4281*m*, Stats., may protect the city by requiring the appellant to give a new bond. *Ibid.*

MURDER. See HOMICIDE.

MUTUALITY. See CONTRACTS, 1.

NAVIGABLE WATERS.

Rights of public: Liability for injury to bridge by vessel.

1. If the failure to maintain upon a bridge over a navigable river the lights prescribed by the federal lighthouse board did not and could not contribute to cause a collision between a vessel and such bridge, such failure will not defeat a recovery of damages for the injury to the bridge. *Marinette v. Goodrich T. Co.* 92

2. Even though it appeared that the prescribed lights were better than those maintained on the bridge, yet evidence tending to show that the steamboat ran into the bridge without giving any signal; that the captain had notice, in time to have avoided the collision, that the bridge was not open; and that in fact he had all the notice and knowledge that he would have had if the lights required by the lighthouse board had been maintained, was sufficient to warrant the jury in finding that the absence of the prescribed lights did not and could not have contributed to the collision. *Ibid.*

3. A finding in the special verdict in such case that no want of ordinary care on the part of the plaintiffs (the cities maintaining the bridge) contributed proximately to the collision, is *held* sufficient, the jury having been instructed that they

could not so find unless satisfied to a reasonable certainty from the evidence that the absence of the prescribed lights could not in any way have contributed to the injury and no objection having been made to the form of the verdict. *Ibid.*

4. Testimony of a bridge tender, who was on the bridge and whose duty it was to watch boats going up and down the river and to listen for the blowing of whistles, that he watched the steamboat in question coming in and listened for a signal from it; that his mind was on the whistle and he was waiting to hear it; but that no whistle was blown, was not merely negative testimony and was sufficient, as against the testimony of a number of witnesses to the contrary, to raise a jury question as to whether or not the whistle was blown. *Ibid.*

NECESSARY PARTIES. See ASSOCIATIONS, 3–6. PARTIES.

NEGATIVE TESTIMONY. See NAVIGABLE WATERS, 4.

NEGLECTED CHILDREN. See STATE PUBLIC SCHOOL.

NEGLIGENCE.

Acts and omissions constituting negligence. See DAMAGES. MASTER AND SERVANT, 3–36. MUNICIPAL CORPORATIONS, 1–4. NAVIGABLE WATERS, 1–3. PLEADING. RAILROADS, 7–25. STREET RAILWAYS. TRIAL, 3–7, 10, 17, 18. WITNESSES, 4.

1. Plaintiff, a machinist, was injured while repairing the trap doors at the top of the shaft of an hydraulic elevator in defendant's building. Upon the evidence (stated in the opinion) it is *held* that there could be no reasonable inference that the movement of the elevator at the time of the accident was due to a leaky valve, and that a verdict for defendant should have been directed on the ground that no actionable negligence on its part was shown. *Ruesch v. Sentinel Co.* 664

Gross negligence. See RAILROADS, 10, 12–14, 18, 19, 21.

2. A finding that want of ordinary care was the proximate cause of the destruction of property negatives gross negligence or wilful destruction. *Lemma v. Searle,* 24

3. A complaint alleging that "defendants, without the permission, knowledge, or consent of this plaintiff, and without any right or authority, destroyed and burned" plaintiff's wood, does not necessarily charge gross negligence, but will support a judgment for damages caused by ordinary negligence. *Ibid.*

Proximate cause of injury. See EVIDENCE, 8, 9. MASTER AND SERVANT, 9, 15, 28, 29. NAVIGABLE WATERS, 3. NEGLIGENCE, 2. RAILROADS, 15, 16.

Same: Verdict based on conjecture.

4. Where there is no direct evidence of how an accident occurred, and the circumstances are as clearly consistent with the theory of a nonactionable cause as a cause that is actionable, no foundation exists for a finding of negligence. *Hotchkiss v. Green Bay & W. R. Co.* 340

Contributory negligence. See MASTER AND SERVANT, 5, 9, 10, 17, 34. MUNICIPAL CORPORATIONS, 2. RAILROADS, 10, 12–14, 18–23.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. CHATTEL MORTGAGES, 1. GIFTS. PRINCIPAL AND AGENT, 2. WITNESSES, 2.

NEW TRIAL.

See TRIAL, 17.

A motion for new trial on the ground of newly discovered evidence is properly denied where the alleged new evidence is merely cumulative and furnishes no substantial ground for believing that, had it been presented to the jury at the trial, a different result would have been reached. *Gunsten v. Green*, 413

NOTICE.

Of appeal. See APPEAL, 15.

Of defect in sidewalk. See MUNICIPAL CORPORATIONS, 1.

OFFICERS. See ATTORNEYS AT LAW, 1.

OPINION EVIDENCE. See EVIDENCE, 8, 9.

PARENT AND CHILD. See DEEDS, 1–3. FRAUDULENT CONVEYANCES, 8.

PAROL EVIDENCE. See CHATTEL MORTGAGES, 3, 4. DEEDS, 8. EVIDENCE, 7.

PARTIES.

See ASSOCIATIONS, 2–6. AUCTIONS AND AUCTIONEERS. JUDGMENT, 3. LIMITATION OF ACTIONS, 12.

In an equitable action between two of the grantees of separate interests in a water power, to determine the extent of their respective rights in the water and to restrain wrongful invasion of or interference with the rights of the plaintiff therein, other grantees of similar rights though proper are not necessary parties. *Kimberly-Clark Co. v. Patten P. Co.* 69

PARTNERSHIP.

The relation: Creation and duration: Dissolution: Accounting.

1. A contract by which plaintiff, the proprietor of a large department store, "leased" to defendants certain space for the maintenance of a department in such store, and which contained among other features provisions for the carrying on of a joint business and a division of the proceeds between the parties, for joint possession of certain aisles and approaches in the store and of certain portions of space leased, and for retention by plaintiff of the key to the store, was more than a lease and might more properly be denominated a partnership or *quasi*-partnership agreement. *Milwaukee Boston Store v. Katz*, 492

2. An action based on a wilful violation of such contract by said defendants and an election by plaintiff to terminate the contract in accordance with its terms for that reason, wherein plaintiff asked that the lease be declared canceled and defendants be ordered and adjudged to quit and surrender the premises to the plaintiff and be enjoined from interfering with plaintiff's possession thereof, and also asked the appointment of a receiver and for an accounting which would involve complicated business relations covering a number of years, is *held* properly maintainable in equity, being in the nature of a suit for dissolution of a partnership and for an accounting, and the remedy at law by an action of unlawful detainer being inadequate. *Ibid.*

3. Said contract provided that defendants should pay to the plaintiff "ten per centum on the gross sales of said department" and

that "all merchandise sold in said department and money received from sales shall be immediately delivered to and handled by" the plaintiff. *Held*, that the terms "gross sales" and "all merchandise sold" included so-called cost sales to employees of the defendants, and that plaintiff was entitled to the stipulated commission upon such sales, irrespective of whether or not the defendants made a profit upon them. *Ibid.*

4. Evidence, stated in the opinion, is *held* to sustain a finding that defendants intentionally violated the contract by concealing and failing to report such cost sales. *Ibid.*

5. Plaintiff, after learning on September 15th that such unreported cost sales had been made in violation of the contract, promptly demanded a full statement thereof. Such a statement was made to it on September 29th, and it then first learned the extent of such sales. On October 2d it notified defendants of its election to cancel the contract and lease as therein provided because of such breach. *Held*, that plaintiff had not, by continuing to do business under the contract and receiving the benefits thereof up to the time of such notice, waived the forfeiture. *Ibid.*

6. At the time of giving notice of cancellation of the agreement, plaintiff offered to continue to transact the business of the department in the manner in which it had theretofore been transacted, without prejudice to the right to insist upon a forfeiture, until a surrender of the premises by defendants. Defendants refused to surrender possession, notified plaintiff that they should continue to hold under their lease, and demanded that plaintiff continue to perform its duties thereunder. Plaintiff then gave notice that pending the determination of an action to enforce its rights the business of the department would be conducted on its part substantially as theretofore, except that it would apply for an order authorizing the deposit of the proceeds of sales or so much thereof as might be sufficient to indemnify it against loss or damage by reason of defendants' unlawful withholding of the premises; and stated that until such order should be made the percentage of the proceeds of sales which it should retain as theretofore would be applied on account of such loss and damage. Plaintiff never applied for such order, and the business was thereafter conducted precisely as it had been before, plaintiff retaining the stipulated percentage. *Held*, that by so continuing the business plaintiff waived its right to insist upon the forfeiture. *Ibid.*

7. Under the circumstances stated, plaintiff must be held to have retained the stipulated percentage as the compensation provided in the agreement. If defendants owed plaintiff damages for withholding possession, they also owed it said percentage on sales made. Hence they as debtors, and not the plaintiff as creditor, had the right to say upon what debt the moneys which they turned over to plaintiff should be applied; and their unequivocal notice to plaintiff that they should continue to hold and do business under the contract was equivalent to a direction that the ten per cent. to be retained by plaintiff should be applied as theretofore. *Ibid.*

8. The fact that great loss would accrue to plaintiff from a sudden termination of the business relations between the parties did

not give it the right to continue such relations even temporarily for its own advantage, and to reap the benefits thereof, without waiving the forfeiture. *Ibid.*

9. When, as in the case stated with respect to such forfeiture and the waiver thereof, declarations and conduct are at variance, the conduct and acts of a party must be held to outweigh declarations and be controlling. *Ibid.*

10. The condition of the contract which defendants violated, requiring them to report all sales and at once turn over to plaintiff the proceeds thereof, was one intended as security for the payment of the ten per cent. commission to which plaintiff was entitled, and full compensation for such breach can be made by a money payment; hence, even in the absence of any waiver, equity may relieve against the forfeiture resulting from such breach. *Ibid.*

11. It appearing that a large business had been built up in defendants' department, the good will of which was of great value; that plaintiff would have almost the whole benefit thereof if defendants were required to vacate the premises; that plaintiff's conduct had been inequitable, in that it had withheld from defendants the fact that it had secured rebates on advertising contracts, a portion of which belonged to defendants, and had wrongfully kept back and retained other considerable sums to which defendants were entitled, it is *held* that, even if there had been no waiver of the forfeiture, equity would relieve against it. *Ibid.*

12. Under the terms of the contract between the parties with reference to advertising, and the practical construction which they gave it from the beginning, plaintiff was not entitled to reimbursement from defendants for moneys paid for newspaper space occupied by head-plates containing the name of the store and by editorial matter relating generally to the store and not to any specific department; nor could the cost of trading stamps properly be charged to this class of general advertising. *Ibid.*

PAYMENT. See BILLS AND NOTES. DEEDS, 7–9. LIMITATION OF ACTIONS, 9. PARTNERSHIP, 7. PRINCIPAL AND AGENT, 2. SALES, 2.

PERSONAL INJURIES. See APPEAL, 2, 3, 13. COMMERCE. DAMAGES. EVIDENCE, 8, 9. FRAUD, 2–4. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1–4. PLEADING. RAILROADS, 7–25. STREET RAILWAYS. TRIAL, 3–7, 10, 17, 18. WITNESSES, 4.

PLACES TO WORK. See MASTER AND SERVANT, 19–21.

PLEA IN ABATEMENT. See CRIMINAL LAW, 1.

PLEADING.

Complaint. See JUSTICES' COURTS, 1. NEGLIGENCE, 3. PLEADING.

Amendment to conform to proof. See ASSOCIATIONS, 5.

The complaint did not charge that defendant was negligent in failing to warn plaintiff of the unsafe conditions, but before the special verdict was submitted a motion was made that the complaint be amended to conform to the evidence on that subject. The court did not then specifically decide such motion, but stated that it would do so, and then proceeded to submit

the issues as if the pleading were so amended, and subsequently treated the case as though the amendment were allowed. *Held*, that this was equivalent to allowing the amendment, and that the question as to whether defendant should have warned the plaintiff was properly included in the special verdict. *Van Dinter v. Worden-Allen Co.* 533

POSSESSION. See ADVERSE POSSESSION. CHATTEL MORTGAGES, 6. CORPORATIONS, 2–4. GIFTS. LIMITATION OF ACTIONS, 1.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 1.

PRESUMPTIONS. See APPEAL, 3, 8. ASSOCIATIONS, 4. DEDICATION, 3. DEEDS, 1, 8, 9. EVIDENCE, 2–4, 7. INSURANCE, 3, 7, 9. PUBLIC UTILITIES, 4. RAILROADS, 12.

PRINCIPAL AND AGENT.

The relation: Creation and existence. See AUCTIONS AND AUCTIONEERS. BILLS AND NOTES. WITNESSES, 1–4.

Unauthorized acts of agent: Ratification.

1. When an agent acts in excess of the authority conferred upon him, and the person for whom he has undertaken to act is fully notified of what has been done, it becomes the duty of the latter either to affirm or disaffirm the act of the supposed agent within a reasonable time after such notice or he is bound by such act. *Senger v. Malloy*, 245

2. A loan broker, authorized only to collect interest on a note and mortgage which he had sold, received partial payments of the principal but did not account therefor to the owner. After the broker's death the owner discovered the facts but did not, until six or eight months later, notify the mortgagors that the broker had no right to collect the principal and that he would look to them for the amounts so paid. He also made demand of the broker's administrator for the amounts so collected, and for a considerable time accepted from such administrator payments of interest on said amounts. *Held*, that he thereby elected to ratify the acts of the broker in receiving the payments on the principal. *Ibid.*

Compensation of agent. See BROKERS.

3. Defendants, as local agents of the plaintiff to sell insurance at certain rates for a certain commission, secured prospective purchasers of insurance in their territory who were ready to purchase if they could secure a satisfactory rate, but who could not be induced to take the insurance at the rate fixed by plaintiff. Defendants notified plaintiff of that fact, whereupon plaintiff, without defendants' knowledge, reduced the rate and itself sold the insurance to said purchasers. *Held*, that defendants were entitled to their commission on the sale. *August Rebhan Co. v. Taylor*, 405

4. In such case defendants were properly allowed commissions on the premiums for the whole period of the insurance, notwithstanding the policies were temporarily canceled for the purpose of defeating their claims. *Ibid.*

Rights and liabilities as to third parties. See BILLS AND NOTES, 4. ESTOPPEL, 1.

PRINTED CASE. See APPEAL, 22.

PRIVITY. See ADVERSE POSSESSION. JUDGMENT, 4–6.

PROMISSORY NOTES. See BILLS AND NOTES. CHATTEL MORTGAGES, 1. PRINCIPAL AND AGENT, 2. WITNESSES, 2.

PROSTITUTION.

Under sec. 4589, Stats., making it an offense to keep a house of ill-fame or to knowingly let any house or room for such use, the keeping of such house or a letting for such use for any substantial time (in this case two days) is sufficient to constitute the offense. *State v. McGinley*, 5

PROXIMATE CAUSE. See EVIDENCE, 8, 9. MASTER AND SERVANT, 9, 15, 28, 29. NAVIGABLE WATERS, 3. NEGLIGENCE, 2, 4. RAILROADS, 15, 16.

PUBLIC UTILITIES.

Regulation of rates. See RAILROADS, 1–6.

Same: Street railways: Legislative powers: Delegation to municipalities: Constitutional law.

1. Authority given by a revised statute (sec. 1862, Stats.) to a municipal corporation to grant to a street railway corporation the use of streets "upon such terms" as the proper authorities shall determine, does not differ from the authority, given by such statute in its original form, to make such grant "upon such terms *and conditions*" as the common council might impose. *Milwaukee E. R. & L. Co. v. Railroad Comm.* 592

2. A municipal ordinance providing that the rate of fare upon a street railway "shall be not to exceed five cents" did not make a fixed rate, as distinguished from a limitation upon the rate, and was not in that respect substantially different from a prior ordinance providing that the rate of fare "shall not exceed five cents." *Ibid.*

3. The power to fix rates and tolls to be charged by public utilities is one of the attributes of sovereignty, and with us is vested in the legislature. *Ibid.*

4. No presumption can be indulged that the legislature has parted with such power, nor will doubtful words be construed as having that effect. *Ibid.*

[5. Whether the legislature could by express language authorize municipal authorities to make contracts with public utilities fixing rates which should exist for definite periods in the future and be beyond legislative control during those periods, is not determined.] *Ibid.*

6. Sec. 1862, Stats., does not empower municipal authorities to make any contract with a street railway company fixing rates of fare so that they may not be changed by the legislature or through a legislative agency (such as the railroad commission) in the manner provided by law. *Ibid.*

[7. Whether municipal ordinances relating to rates of fare upon a street railway and claimed to be in the nature of contracts are subject to alteration or repeal under sec. 1, art. XI, Const., not determined.] *Ibid.*

Railroad commission: Compelling adequate service: Strikes: Jurisdiction of courts: Mandamus.

8. The legislature having clothed the railroad commission with full authority to act *quasi*-judicially in a case where a public utility corporation (in this instance a street railway company) has been rendered incapable of performing its public duty without submitting to such terms as its employees, acting in combination, may prescribe, and where, on behalf of the public, the furnishing of adequate service by such corporation is sought to be compelled,—and a judicial review of the determination of the commission having been provided for,—the courts should not, unless in an extraordinary emergency, interfere in the first instance by their coercive authority, but should leave the parties to their remedy before the commission. *State ex rel. Superior v. Duluth St. R. Co.* 650

QUARRIES. See MASTER AND SERVANT, 20–22.

QUIETING TITLE. See JUDGMENT, 2.

QUITCLAIM DEED. See DEEDS, 5, 6.

RAILROAD COMMISSION. See CONSTITUTIONAL LAW. PUBLIC UTILITIES, 6, 8. RAILROADS, 2, 3, 5, 6.

RAILROADS.

Regulation of rates: Relief against excessive charges: Exclusive remedy.

1. The legislature has power to fix the rates to be charged by railway companies, either directly or by delegation of authority to an appropriate agency, provided the rates fixed are such as to afford reasonable compensation for the services rendered. *Frank A. Graham Ice Co. v. Chicago, M. & St. P. R. Co.* 145

2. The remedy provided by secs. 1797—37*m* (Laws of 1907, ch. 582), 1797—12*a* (Laws of 1909, ch. 271), and ch. 362, Laws of 1905, for the fixing of freight charges and for relief against excessive charges was intended by the legislature to be exclusive, and full power in respect to these matters is lodged in the railroad commission. *Ibid.*

3. Under these statutes, the rates printed in the schedules made and filed by a railway company conformably to law constitute the lawful rates until changed in the manner provided, on application to the commission, and the railway company can charge neither more nor less without violating the law. In a common-law action, therefore, to recover for excessive rates, the courts cannot pronounce such schedule rates unlawful. *Ibid.*

4. In view of other parts of ch. 362, Laws of 1905, it is not considered that sec. 34 of that act was intended by the legislature to preserve the common-law remedy to the extent of allowing the schedule rates to be attacked in a common-law action. *Ibid.*

5. Secs. 1797—37*m* and 1797—12*a*, while they provide for the recovery by a shipper, in certain cases, of part of the money paid although not in excess of schedule rates, do not contemplate that any reparation can be made until application has first been made to the railroad commission under sec. 12, ch. 362, Laws of 1905, and the schedule rates have been found unreasonable or unjustly discriminatory. *Ibid.*

6. Where the rates paid by a shipper are the schedule and lawful rates at the time when paid, the fact that another shipper afterwards obtains a reduction of rates in a proceeding before the railroad commission, even in the same district, will not bind the railway company in a common-law action by the first shipper to recover for excessive charges, nor sustain such action. *Ibid.*

Operation: Injuries to freight. See CARRIERS, 3, 4.

Same: Accidents at grade crossings: Safeguards: Gross negligence: Proximate cause.

7. The grade-crossing statute (sec. 1809, Stats.), though drastic in its provisions, is a statute *in favorem vitæ*, and in construing it, if there be room for two meanings, the courts should give to it such meaning as will result in the accomplishment of the legislative purpose, rather than a meaning that will tend to defeat that purpose. *Jorgenson v. Chicago & N. W. R. Co.* 108

8. The term "gates," as used in that statute, means, not a single gate, but gates upon both sides of the track, and to constitute a compliance with the act, where a railway company adopts gates as a safeguard, both must be maintained and operated. *Ibid.*

9. If a gate becomes temporarily out of commission and its repair requires the services of an expert workman not immediately at hand, the statute can be satisfied by the placing of a flagman at the crossing for the time being, or the speed of trains can be temporarily reduced to meet the new situation, and it is the duty of the railway company to adopt one or the other of these courses. *Ibid.*

10. The running of trains by a railway company at a speed exceeding twelve miles per hour over a grade street crossing in a city, at a time when the prescribed safeguards are not maintained, is a violation of the statute and an "omission" to comply with its requirements, and in an action for personal injuries caused thereby no want of care on the part of the person injured, less than gross negligence, will bar a recovery. *Ibid.*

11. The requirement in the statute of "an efficient electric alarm bell or signal properly installed and in good working order" refers clearly to the well-known appliance in common use at railroad crossings, namely, a bell or gong arranged with electric wires so as to ring automatically and continuously so long as a car or engine is on the crossing or within a given distance of it; and a tower bell rung by hand is not a compliance therewith. *Ibid.*

12. The term "gross negligence," incorporated into said sec. 1809 by ch. 653, Laws of 1911, had, before that law was passed, received a very certain and definite meaning in the jurisprudence of this state, excluding mere inadvertence in any degree; and it must be conclusively presumed that the legislature knew of such meaning and used the words deliberately, intending to give them their established legal significance. *Ibid.*

13. As there used, gross negligence would cover not merely a suicidal act, but any entry by a person upon the crossing with a

reckless disregard of the consequences, not caring what result might happen to him or to the occupants of the train. *Ibid.*

14. Plaintiff's intestate, on his way to his work, approached a double-track crossing with which he was familiar and which had been for many years protected by gates, and found it occupied by an engine and cars engaged in switching, with the nearer gate down. Passing by the gate and around the rear of the switch engine which still obstructed the walk, he was seen to look up the track, but the jury found that his view was obstructed by smoke and steam from the engine. The gate on the opposite side was up and he proceeded to cross at an ordinary walk and was about over the last rail of the further track when struck by a passing train. *Held*, that he was not guilty of gross negligence as a matter of law. *Ibid.*

15. Evidence showing the facts above stated is *held* to sustain a finding by the jury that the speed of the train, exceeding twelve miles per hour, was the proximate cause of the death. *Ibid.*

Same: Running over child on track: Conjecture as to cause of accident.

16. In an action against a railway company for the death of a six-year-old child run over by a gravel train, where there was some evidence of a board being broken from a gate leading onto defendant's right of way near where the accident occurred, but none that the deceased entered through such break, and a conjecture that he did so enter had no greater probability to sustain it than that he entered through, under, or over the fence at some other point, a finding by the jury that the child got upon the track by reason of the broken board in the gate was unwarranted. *Hotchkiss v. Green Bay & W. R. Co.* 340

17. It was also *held* under the facts, stated in the opinion, that there was no support for a finding that the defendant's servants in charge of the train were wanting in ordinary care in the operation and management of the same. *Ibid.*

Same: Injury to trespasser on bridge: Gross negligence: Instructions to jury.

18. In an action for personal injuries sustained by plaintiff, who was struck by an engine while crossing a river on a railway trestle, the evidence is *held* to sustain a finding by the jury that after the time he discovered plaintiff on the trestle the engineer was not guilty of gross negligence in respect to stopping the train so as to avoid the accident. *Langowski v. Wis. Cent. R. Co.* 418

19. In view of the issue raised as to gross negligence, there was no error in charging the jury that plaintiff was a trespasser on the trestle and that such an act is made punishable by the laws of this state. *Ibid.*

20. There was no error in the charge as to the competency and credibility of plaintiff's witnesses. *Ibid.*

21. Nor was there error in a charge to the effect that if, after the engineer discovered plaintiff on the bridge, he could not by the use of reasonable and due care have stopped the train before plaintiff was struck, then the jury should not find the engineer

guilty of gross negligence, but if he could have stopped the train by the use of due care in time to have prevented the accident the jury should give that fact its proper weight in determining whether he recklessly and wantonly ran the plaintiff down. *Ibid.*

Same: Injury to traveler at crossing: Contributory negligence.

22. While crossing railway tracks on a highway, plaintiff's cart was struck by an engine and he was injured. Under the evidence, stated in the opinion, it is *held* that, as a matter of law, he was guilty of more than a "slight want of ordinary care" contributing to the injury, within the meaning of sub. 6, sec. 1809, Stats. (Laws of 1909, ch. 332), and that a recovery was barred. *O'Toole v. Duluth, S. S. & A. R. Co.* 461

Same: Injuries to employees. See COMMERCE. WORKMEN'S COMPENSATION.

Same: Injury to employee in yards: Violation of orders: Scope of employment: Contributory negligence.

23. Plaintiff, who was employed in defendant's yards as engine "dispatcher" or "hostler," was walking in a beaten path at the side of the track northward from a cinder pit into which another employee was throwing water from a hose, causing a cloud of steam to rise and spread over the track in the direction plaintiff was going. Wishing to cross the track, he stopped and listened and, hearing no sound but a hissing noise which he thought was produced by the throwing of water on the hot cinders, stepped on the track without looking toward the south and was struck by a "drifting" engine coming from that direction. *Held* that, in view of the facts that there was a yard regulation requiring the stopping of all engines south of the cinder pit, which the engineer failed to observe, and that the duties of yardmen necessarily take them frequently upon and about the tracks, it cannot be said as a matter of law that plaintiff was guilty of contributory negligence, although upon the same evidence the jury would have been warranted in finding that to be the fact. *Gray v. Chicago & N. W. R. Co.* 637

24. Under the circumstances stated, plaintiff's testimony that he listened but could not hear the natural and necessary noises of the engine as it approached, was not incredible. *Ibid.*

25. Although the engineer of the engine which struck plaintiff violated the orders of his employer in running past the cinder pit instead of delivering his engine to the engine dispatcher south of the pit, he was nevertheless within the scope of his employment so far as third persons were concerned. *Ibid.*

Same: Federal Employers' Liability Act: Injury to employee not employed in interstate commerce.

26. To bring a case within the federal Employers' Liability Act it is necessary not only that the employer be engaged in interstate commerce but that the injured employee shall suffer his injury while he is employed therein. *Gray v. Chicago & N. W. R. Co.* 637

27. An employee whose duty it is to care for and dispatch engines used in both interstate and intrastate commerce cannot be said to be employed in interstate commerce during the entire

day; especially not during the periods of leisure or rest, while merely waiting for the arrival of an engine. *Ibid.*

28. To warrant a reversal for the exclusion of evidence offered for the purpose of showing the case to be within the federal act, where plaintiff's injury occurred during a period of leisure or rest, the offer should be so definite and certain as to apprise the trial court of the fact that the proof so offered would tend to establish that plaintiff's entire work was connected with interstate commerce. *Ibid.*

RAPE.

Assault with intent to commit rape.

1. Evidence *held* sufficient to sustain a conviction of assault with intent to commit rape upon a female who was so intoxicated as to be insensible and incapable of consenting. *Quinn v. State,* 573

2. In such a case the act must be treated as being against her will. *Ibid.*

3. The crime charged against defendant was an assault with intent to commit rape and the court instructed the jury as stated in the opinion. *Held* that, the attention of the jury being specifically directed to the necessity of finding that defendant had knowledge of the female's condition, there was no prejudicial error in failing to bring that to their attention in the first part of the instruction; especially as the evidence showed that in fact he must have known of the actual condition as to her intoxication brought about through his own acts. *Ibid.*

4. The giving of intoxicating liquor to a female constitutes an assault with intent to commit rape if given with the intent to destroy her power of resistance by reducing her to insensibility, and with the present intent to have sexual intercourse with her when in that condition. *Ibid.*

5. Where it was shown that at the time of the assault the female was insensible and in a stupor, there was no error in refusing a requested instruction as to the effect of the absence of any outcry on her part. *Ibid.*

RATES. See PUBLIC UTILITIES, 2–7. RAILROADS, 1–6.

RATIFICATION. See BILLS AND NOTES, 6. PRINCIPAL AND AGENT, 1, 2.

REAL PROPERTY. See ADVERSE POSSESSION. BROKERS. CORPORATIONS, 2–6. DEDICATION. DEEDS. DESCENT AND DISTRIBUTION. ESTOPPEL. FRAUDULENT CONVEYANCES, 1–4. JUDGMENT, 4, 5. LIMITATION OF ACTIONS, 1. VENDOR AND PURCHASER.

RECONCILIATION. See CONTRACTS, 3. WITNESSES, 2.

RELEASE. See CONTRACTS, 1. FRAUD, 2–4.

REQUESTS FOR INSTRUCTIONS. See INSTRUCTIONS TO JURY, 1. MASTER AND SERVANT, 5. RAPE, 5.

RESCISSION. See SALES, 1, 2. VENDOR AND PURCHASER.

RES JUDICATA. See APPEAL, 3. DESCENT AND DISTRIBUTION. JUDGMENT, 4–7.

REVOCATION. See ATTORNEYS AT LAW, 3, 4, 7. DEEDS, 2.

RULES AND REGULATIONS. See MASTER AND SERVANT, 22.

SALES.

Rescission by buyer.

1. The purchaser of stock in a creamery company having made timely demand for rescission on the ground of fraud, the fact that the creamery was afterwards burned and that the wagons and milk cans were then sold does not defeat his right to enforce rescission in equity, on the ground that he cannot tender back all that he received or place his vendor *in statu quo*, where the money received for said equipment and the insurance money are held for such vendor either in the treasury of the company or by the clerk of the court. *Baker v. Becker*, 369

2. A payment made by a purchaser of property upon the purchase price, before he has full information respecting the falsity of representations upon which he relied in making the purchase, will not constitute a waiver of his right to rescind. *Ibid.*

Warranty: Evidence of market price.

3. In an action for the purchase price of goods,—the issue being whether they were bought as first-class goods with a warranty of quality, as claimed by defendant, or were bought at a discount from the market price with the understanding that they were a job lot of damaged goods, as plaintiff claimed and testified,—it was error to exclude evidence as to the value and market price of first-class goods of that kind at the time of the sale, offered by defendant for the purpose of contradicting plaintiff's claim and testimony and showing that the sale price was the full market price. *M. D. Wells Co. v. Raywortk*, 453

SALOONS. See INTOXICATING LIQUORS.

SHAFTING. See MASTER AND SERVANT, 6–10, 12, 13. TRIAL, 5–7.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 1–3. WITNESSES, 3.

SIMPLE TOOLS. See MASTER AND SERVANT, 18.

SPECIAL VERDICT. See APPEAL, 14. MASTER AND SERVANT, 5, 9, 29. NAVIGABLE WATERS, 3. PLEADING. TRIAL, 10–18.

STARE DECISIS. See WATERS AND WATERCOURSES, 3.

STATE PUBLIC SCHOOL.

1. Proceedings for the commitment of dependent or neglected children to the state public school, which under sec. 573*f*, Stats., are to be had before the county judge, are valid if had before the county judge sitting as a court. *State ex rel. Spritka v. Parsons*, 20

2. Said statute does not confer judicial powers upon the county judge contrary to sec. 2, art. VII, Const. of Wis.; nor does it violate the provision in amendm. V, Const. of U. S., respecting due process of law. *Ibid.*

3. Where commitment proceedings under sec. 573*f*, Stats., are brought to the circuit court for review on writ of *certiorari*, neither an alleged error in denying an application for a continuance nor the weight or credibility of the evidence in support of the findings of the county judge can be considered, neither of such matters being jurisdictional; nor can they be considered upon an appeal to this court from the judgment of the circuit court. *Ibid.*

STATUTES.

Construction. See APPEAL, 15. ASSOCIATIONS, 2. ATTORNEYS AT LAW, 5. CHATTEL MORTGAGES, 7. CONSTITUTIONAL LAW. CORPORATIONS, 1, 2, 5, 6. COSTS, 3. FRAUDULENT CONVEYANCES, 2, 5. HIGHWAYS, 2. INTOXICATING LIQUORS. JUDGMENT, 3. JUSTICES' COURTS, 1. LIMITATION OF ACTIONS, 9–12. MASTER AND SERVANT, 1, 2, 11, 12, 14. MUNICIPAL CORPORATIONS, 6. PROSTITUTION. PUBLIC UTILITIES, 1, 6. RAILROADS, 2, 4, 5, 7, 12, 22. STATE PUBLIC SCHOOL. TRIAL, 1, 2. VENUE, 1. WORKMEN'S COMPENSATION, 1.

1. The plain language of a statute cannot be rendered ambiguous by an erroneous popular conception of its intent. *Minneapolis, St. P. & S. S. M. R. Co. v. Industrial Commission,* 552

2. Where a special committee of the legislature, appointed to investigate a subject, reported a bill which was divided into subjects by appropriate headings and was accompanied by explanatory notes both by the committee and by counsel who were employed to assist it, and the proposed legislation was enacted in the light of such headings and notes, they may be properly considered in determining whether there is any obscurity in the law calling for judicial construction. *Ibid.*

STAY OF EXECUTION. See APPEAL, 16–18.

STOCK AND STOCKHOLDERS. See APPEAL, 6.

STREET RAILWAYS.

Regulation of rates. See PUBLIC UTILITIES, 1–7.

Negligence: Injuries to passengers.

1. In an action for personal injuries alleged to have been sustained while alighting from an electric car, admissions and evidence tending to show that defendant owned the road on which the car was being operated and that its name was on the car, together with the motorman's testimony that he was working for defendant, were sufficient, *prima facie,* to show that defendant was operating the car. *Baermann v. Chicago & M. E. R. Co.* 235

2. After the motorman, upon being examined as an adverse witness under sec. 4068, Stats., had testified that he was working for defendant, it was error to refuse to permit defendant to cross-examine him on that subject; but the error was not prejudicial, it appearing that the motorman was afterwards called as a witness by defendant, but no questions asked of him as to that matter and no proof offered that defendant was not operating the car in question. *Ibid.*

3. Plaintiff's testimony that the car on which she had been riding had stopped and that it suddenly started up while she was in the act of getting off, corroborated to some extent by the testimony of her son, about eight years old, who was with her, was sufficient to raise a jury question as to defendant's negligence, although three passengers and the motorman and conductor testified that plaintiff attempted to alight from the car while it was in motion. *Ibid.*

4. In an action for personal injuries received in a collision between two electric cars, it appeared that it was the custom for the

cars upon the line on which plaintiff was a passenger to give cars on the crossing line the right of way at the place of the collision; that the motorman in charge of plaintiff's car stopped within fifteen feet of the crossing track and then turned on the current and attempted to cross, but was struck after going about thirty feet by a car on the other track coming down grade at a speed of thirty feet a second, both cars being lighted and it being a bright moonlight night. The motorman testified that before starting the car after the stop he looked up the other track and that it was clear for a distance of 375 feet. *Held*, that such testimony was incredible and that the motorman was guilty of actionable negligence as a matter of law. *Gertz v. Milwaukee E. R. & L. Co.* 475

STREETS. See DEDICATION, 1, 3, 4. MUNICIPAL CORPORATIONS, 1–4.

STRIKES. See PUBLIC UTILITIES, 8.

SUICIDE. See INSURANCE, 7, 8.

SURPLUSAGE. See CONTRACTS, 2.

TACKING. See ADVERSE POSSESSION. CORPORATIONS, 3.

TAX DEEDS. See LIMITATION OF ACTIONS, 10, 12.

TOWNS. See HIGHWAYS.

TRESPASSERS. See RAILROADS, 16–21.

TRIAL.

Course and conduct of trial: View by jury.

1. Under sec. 2852, Stats., it rests in the sound discretion of the trial court whether or not a view by the jury shall be had; and the granting of a view will not be held error unless palpably wrong and prejudicial. *Serdan v. Falk Co.* 169

Same: Time consumed: Length of findings and judgment: Costs.

2. The length of time consumed in the preliminary proceedings and in the trial of this case, and the excessive amplitude of the so-called findings and judgment, are criticised; and under ch. 214, Laws of 1913 (sec. 2405*m*, Stats.), it is *held* that, although no exceptions were taken to the allowances mentioned, it was a miscarriage of justice to allow costs for more than four days trial work and to allow any costs to be taxed for the findings and judgment. *Krueger v. Buel*, 583

Reception of evidence. See APPEAL, 13. EVIDENCE, 3, 4. FRAUDULENT CONVEYANCES, 5. INSURANCE, 8. MASTER AND SERVANT, 33. RAILROADS, 28. SALES, 3.

3. Plaintiff, a Croatian unable to speak English, had made through an interpreter a statement to defendant of the circumstances of his injury. Upon the trial the interpreter and another Croatian, who had been present but who spoke a different dialect, were asked by defendant whether in their opinion plaintiff understood everything said by the interpreter when such statement was made. *Held*, that such questions were very near the border line of admissibility, and that the error, if any, in excluding them was not substantially prejudicial. *Jakopac v. Newport Mining Co.* 176

4. Where, after defendant had introduced and read a deposition, plaintiff was permitted to read to the jury the notice and cer-

tificate showing that the deposition was taken in the office of the warden of a penitentiary, thus allowing the jury to infer that the witness was a convict, the error, if any, is not ground for reversal, in view of an admission by defendant's counsel at the trial that the witness was in fact a convict, since in case of a new trial this fact would probably be proved by record evidence. *Ibid.*

5. In an action for the death of an employee, caused by being caught on a line shaft while engaged, according to plaintiff's theory, in putting a belt onto a pulley on such shaft, there being no witness who saw the accident, it was competent to prove by other shop employees the ordinary method of putting a belt on under the circumstances, that not being a matter of common knowledge, in order to show that the deceased would thereby be brought in close proximity to the shaft where his clothing would be likely to be caught. *Nickels v. Manitowoc S. & D. D. Co.* 298

6. After defendant's foreman had testified that the belt which the deceased was putting on at the time of his death was always put on while the shaft was in motion, there was no error in permitting him to testify that he expected the deceased would do it in that way when he sent him to the place. *Ibid.*

7. Where a break on the edge of a pulley was alleged in the complaint to be one of the causes of the death of plaintiff's intestate, but no evidence was offered on the trial tending to show that the break had any connection with the accident, which occurred in an attempt by deceased to put a belt onto such pulley, the mere admission of the pulley in evidence, even if error, was not prejudicial. *Ibid.*

8. Where the parties to a sale of horses differed in their testimony as to what horses were included therein, evidence as to the value of the horses was admissible. *Gunsten v. Green,* 413

Arguments and conduct of counsel.

9. Statements by counsel in the argument to the jury cannot be held to have constituted prejudicial error where there is no agreement and no authoritative statement in the record as to just what was said, and especially where the evidence seems, in a degree at least, to have warranted the alleged statements complained of. *Jakopac v. Newport Mining Co.* 176

Taking case or question from jury: Questions for jury. See MASTER AND SERVANT, 3, 10, 17, 32. MUNICIPAL CORPORATIONS, 2. NAVIGABLE WATERS, 4. STREET RAILWAYS, 3, 4.

Same: Direction of verdict. See HUSBAND AND WIFE. NEGLIGENCE, 1.

Instructions to jury. See HOMICIDE, 2. INSTRUCTIONS TO JURY. MASTER AND SERVANT, 5. NAVIGABLE WATERS, 3. RAILROADS, 19–21. RAPE, 3. TRIAL, 10.

Same: Requests for instructions. See INSTRUCTIONS TO JURY, 1. MASTER AND SERVANT, 5. RAPE, 5.

Verdict. See APPEAL, 11.

Same: Impeachment of verdict. See JURY.

Same: Setting aside verdict. See JURY, 1.

Same: Special verdict. See APPEAL, 14. MASTER AND SERVANT, 5, 9, 29. NAVIGABLE WATERS, 3. PLEADING.

10. In an action for personal injuries, the refusal to submit in the special verdict the question, "Is plaintiff's present physical condition of which she complains due to the accident?" was not error, where the jury were instructed that plaintiff could recover only such damages as it was reasonably certain she had suffered "as a natural and probable consequence of the injury which she sustained." *Baermann v. Chicago & M. E. R. Co.* 235

11. The trial court may properly refuse to submit questions proposed for the special verdict which relate merely to details of evidence and the answers to which would determine no issue. *Novitski v. Waite Grass Carpet Co.* 266

12. Where the questions of a special verdict fully cover the issues and are unobjectionable in form, the refusal of the court to submit other questions is not error. *Nickels v. Manitowoc S. & D. D. Co.* 298

13. The trial court may properly change or disregard answers in a special verdict which, by the other answers and the evidence, are shown to be erroneous as a matter of law. *Baker v. Becker,* 369

14. The form of a special verdict is largely in the discretion of the trial court, and it is sufficient if it covers the material issues in such a way as to resolve all disputes in respect to them. *Gunsten v. Green,* 413

15. Questions proposed for special verdict which cover no issuable fact, or which relate to matters otherwise properly submitted, are properly refused. *Langowski v. Wis. Cent. R. Co.* 418

16. A question proposed for special verdict as to "what amount of punitory damages will compensate the plaintiff," was properly refused. *Ibid.*

17. Where the trial court, because it changed answers in the special verdict and rendered judgment for defendant, did not pass upon defendant's alternative motion for a new trial nor a motion that the damages be reduced, this court, upon reversing the judgment, remands the cause with directions to consider and determine whether a new trial should be granted, and, if not, whether the damages were excessive. *Smith v. Winnebago Realty Co.* 469

18. Findings in a special verdict to the effect that it was the master's duty to warn a servant as to certain dangers, and that the servant in the exercise of ordinary care ought to have known and appreciated such dangers, are inconsistent and cannot be reconciled. *Van Dinter v. Worden-Allen Co.* 533

TRIAL BY JURY. See CONSTITUTIONAL LAW.

UNDUE INFLUENCE. See VENDOR AND PURCHASER. WILLS, 4–15.

UNGUARDED MACHINERY. See MASTER AND SERVANT, 6–16.

VALUE. See CARRIERS, 3, 4. TRIAL, 8.

VENDOR AND PURCHASER OF LAND.

Remedies of purchaser: Rescission: Mental capacity of purchaser.

1. In an action to rescind a contract and set aside conveyances by which plaintiff, an infirm and weak-minded woman, exchanged real property worth $6,000 for an equity in other property not worth to exceed $3,000, findings of the trial court to the effect that plaintiff's mental condition was such that she did not comprehend or appreciate what she was doing and that defendants dealt with her knowing her condition are *held* to be sustained by the evidence. *Krueger v. Buel,* 583

2. Plaintiff did not, in such case, waive her right to rescind by failing to bring suit until nearly six months after the exchange, it not appearing that her mental condition improved in the meantime or that she ever fully appreciated to what extent she had been wronged. *Ibid.*

VENUE.

1. The rule that after a trial has been commenced it is too late to apply for a change of venue under sec. 2625, Stats., does not apply where a trial has been initiated and discontinued, making a second initiation necessary, and the application for a change of venue is made before the latter occurs. *Greene v. American Malting Co.* 216

2. A mere change of the presiding judge in the circuit court for Milwaukee county is not a change of venue. *Ibid.*

3. Even if a change in the presiding judge affected the jurisdiction of said court over the parties and the particular controversy, any objection on that ground was waived by voluntary submission to trial. *Ibid.*

VERDICT. See JURY. TRIAL, 10–18.

VESTED RIGHTS. See CONSTITUTIONAL LAW.

VICE-PRINCIPAL. See MASTER AND SERVANT, 26.

VIEW. See TRIAL, 1.

VOLUNTARY ASSOCIATIONS. See ASSOCIATIONS.

VOLUNTEER. See AUCTIONS AND AUCTIONEERS, 2. HIGHWAYS, 7.

WAIVER.

See APPEAL, 3. CHATTEL MORTGAGES, 7. INSURANCE, 5, 6. PARTNERSHIP, 5, 6, 8, 9, 11. SALES, 2. VENDOR AND PURCHASER, 2. VENUE, 3.

A waiver must be predicated upon the intentional relinquishment of a known right; and in order to constitute a known right the substantial facts and circumstances out of which the right springs must be known. *Milwaukee Boston Store v. Katz,* 492

WARNING SERVANT. See MASTER AND SERVANT, 6, 7, 23–26. PLEADING, TRIAL, 18.

WARRANTY. See SALES, 3.

WATER POWERS. See WATERS AND WATERCOURSES.

WATERS AND WATERCOURSES.

Grants of water power: Construction and operation. See JUDGMENT, 4, 5. LIMITATION OF ACTIONS, 1. PARTIES.

1. In a grant of water power, if the size of the opening only is given and the volume of water is not otherwise fixed by the

terms of the grant, the water should be taken at its most efficient velocity, namely, at the rate of two feet per second; but this rule does not apply to a grant of so much water through a specific opening as the grantee may need for whatever machinery may be erected on certain described premises, where such machinery requires a volume greater than would be obtained at that velocity, even though the drawing of the water at an increased velocity is wasteful. [Whether, after having erected machinery on the premises in question requiring for its operation a certain amount of power, the grantee could increase the volume of water to which it was entitled under such a grant by thereafter erecting machinery on said premises requiring a greater amount of power, not decided.] *Kimberly-Clark Co. v. Patten Paper Co.* 69

2. Where a grant was made of water to be taken from the south fifteen feet of a certain bulkhead, and the aperture made by the grantee was thirteen feet six inches wide, the balance of the fifteen feet being taken up with the side walls or supports of the flume and opening in the bulkhead, it was no ground for equitable interference that the timbers supporting such walls extended sixteen inches beyond the fifteen feet, where they did not encroach upon the property of the plaintiff. *Ibid.*

3. In the construction of a grant the doctrine of *stare decisis*, though the decision be between other parties, and the practical construction and long acquiescence therein by the parties to the grant and their assigns, are entitled to much weight. *Ibid.*

4. Where a grant was of the right to draw and use for hydraulic purposes "so much water as not to exceed in all 200 horse power," and this was followed in the same instrument by a covenant for quiet enjoyment which described the thing granted as "200 horse power net," it is *held* that the words "horse power" in the granting clause were ambiguous, as meaning either available or theoretical horse power, and the use of the word "net" indicated that actual or available horse power was intended. *Ibid.*

5. In a grant of water power the words "so much water not exceeding 1,000 inches as [the grantee] may need for any machinery which he or his assigns may erect" on a certain lot, are construed to mean water for use in driving machinery on the designated lot only. *Ibid.*

6. The evidence in this case is *held* to sustain findings to the effect that certain grants of a specified number of inches of water meant theoretical inches, and grants of specified horse power meant theoretical horse power. *Ibid.*

WILLS.

Nature and extent of testamentary power.

1. Every person of mature years and sound mind has an inherent right to make a will, which neither the court can abridge nor the legislature take away. *Ball v. Boston,* 27

2. Regardless of the testamentary wish as to beneficiaries, if it be expressed lawfully, there is no right in law nor duty in equity other than to enforce it. *Ibid.*

3. The testamentary, is as ample as the contracting, power, and courts should uphold exercise of the former as firmly as the latter, regardless of the wishes of disappointed relatives. *Ibid.*

Requisites and validity: Undue influence.

4. The charge that a will, good in form, and made by a person having testamentary capacity, is the will of another, produced by that other's undue influence, sounds in fraud. *Ball v. Boston*, 27

5. In case of an inquiry as to whether a will, good in form, is void for undue influence, the rule applies that he who charges fraud, to prevail, must support his claim by clear and satisfactory evidence. *Ibid.*

6. In an inquiry as to whether a will is the product of undue influence, the same as others sounding in fraud, the *onus probandi*, from first to last, is on the one charging the wrong, requiring clear and satisfactory evidence to satisfy it. *Ibid.*

7. The rule that,—in case of opportunity for the exercise of undue influence being clearly shown, a subject unquestionably susceptible thereto, and clear indications, by direct or circumstantial evidence, of exercise thereof, the person to be benefited by the wrong is called upon to rebut the presumption against him by showing good faith,—does not involve any shifting of the burden of proof. *Ibid.*

8. In case of its appearing, *prima facie*, that preference by will was secured by undue influence, and defendant so weakens such showing that the essential evidentiary circumstances no longer rest on clear and satisfactory evidence, such showing will not warrant a recovery. *Ibid.*

9. A testamentary preference secured by undue influence contemplates existence of a wrongdoer and perpetration by him of a fraud upon an unwilling or unsuspecting victim; rendered substantially powerless by "insidious approaches, seductive artifices, or other species of circumvention," disabling such other from acting of his own volition. *Ibid.*

10. Undue influence is the antithesis of right influence. One may, in some circumstances, rightfully influence and persuade another to provide by will in his or her favor, especially in case of a wife or near relative, so long as the testator, in the end, acts upon his own judgment. *Ibid.*

11. Opportunity to exert undue influence spoken of among essentials of a *prima facie* circumstantial showing of the procurement of a will by undue influence, is not satisfied by the ordinary and natural seclusion and association in the domestic relations of husband and wife. *Ibid.*

12. Neither the natural attentions of a wife to her invalid husband, nor her helpful efforts in caring for his business and property, nor efforts, at his request, to aid him in efficiently expressing his dying wishes as regards his property, are badges of fraud. *Ibid.*

13. The natural characteristics of secrecy in making a will, either as to the fact of making or the contents of the paper, do not answer to that secrecy sometimes legitimately referred to as circumstantially bearing on the question of undue influence. *Ibid.*

14. The *onus probandi* being on the person charging procurement of a will by undue influence, incidents in the lives of an alleged victim and wrongdoer being shown to circumstantially establish the charge, which might be regarded condemnatory or in-

nocent according to circumstances, the latter should be taken as the true aspect in the absence of satisfactory indication to the contrary. *Ibid.*

15. Setting aside that which purports to be a man's final testamentary wishes, is of such serious nature that, in case of an alleged wrongdoer being so near to the testator as that of a wife, especial care should be exercised to avoid possibility of defeating the dying hope to have provided for his surviving spouse. No mere suspicious circumstances should have weight nor inference of wrong be raised from the natural incidents of the relations of husband and wife. *Ibid.*

Same: Execution.

16. The fact that the testator's signature follows instead of precedes the attestation clause does not invalidate a will. *Gale v. Freeman,* 337

17. Where a will was regularly signed and sealed by the testator at the end of the attestation clause, and such signature was duly witnessed, the fact that a signature above the attestation clause was at some time wholly or partially obliterated does not prove a revocation. *Ibid.*

Probate: Evidence.

18. In a proceeding for probate of a will, the evidence is *held* to sustain a finding by the trial court that a subsequent will (which was lost) was not executed by the testator until after June 25, 1903, at which time, by reason of injuries, he became mentally incompetent. *Gale v. Freeman,* 337

WITNESSES.

Competency. See RAILROADS, 20.

Same: Confidential relations: Husband and wife.

1. A wife cannot testify in her husband's behalf except as to matters in which she acted as his agent. *Kiepert v. Nugent,* 127

2. In an action upon a promissory note, where defendant claimed that under an agreement with plaintiff he should be credited a certain sum for bringing about a reconciliation between plaintiff and his wife and testified to the transactions with the wife for the purpose of showing that such reconciliation was effected by him, the wife was not a competent witness to deny defendant's statements as to such transactions; and the error in permitting her to testify on that subject is ground for a reversal. *Ibid.*

3. The wife was competent, however, in such a case to testify as to conversations with and admissions by the defendant upon an occasion when, as agent for her husband, she went to defendant to collect a balance supposed to be due on the note in suit. *Ibid.*

4. Where a married woman, injured by reason of a defect in a sidewalk, had requested her husband to investigate the condition of the walk and file a claim for her against the city, he was so far her agent as to be a competent witness in her behalf on those points. *Madison v. Antigo,* 448

Cross-examination. See STREET RAILWAYS, 2.

5. Error in refusing to permit cross-examination of an employee of defendant, called as an adverse witness under sec. 4068, Stats., cannot be regarded as prejudicial where such witness was called almost at the close of plaintiff's case and defendant could have put him upon the stand as a witness for the defense within a few minutes after his examination as an adverse witness ceased, but did not choose to do so. *Nickels v. Manitowoc S. & D. D. Co.* 298

Credibility. See RAILROADS, 20. TRIAL, 4.

WORDS AND PHRASES.

All merchandise sold, in contract. See PARTNERSHIP, 3.
Assault with intent to commit rape, in statute. See RAPE, 4.
Conditions, in statute. See PUBLIC UTILITIES, 1.
Electric alarm bell, etc., in statute. See RAILROADS, 11.
Employed by such carrier in such commerce, in statute. See COMMERCE, 3.
Employees working in shops and offices, in statute. See MASTER AND SERVANT, 2.
Every place where persons are employed to perform labor, in statute. See MASTER AND SERVANT, 14.
Gates, in statute. See RAILROADS, 8.
Given, in statute. See APPEAL, 15.
Gross negligence, in statute. See RAILROADS, 12.
Gross sales, in contract. See PARTNERSHIP, 3.
Horse power, in conveyance. See WATERS AND WATERCOURSES, 4.
Incurring of a debt or liability, in statute. See CORPORATIONS, 1.
Instrument for the payment of money only, in statute. See JUSTICES' COURTS, 1.
Net, in conveyance. See WATERS AND WATERCOURSES, 4.
Omission, in statute. See RAILROADS, 10.
Place where labor is performed, in statute. See MASTER AND SERVANT, 14.
Privies. See JUDGMENT, 6.
Securely guarded, in statute. See MASTER AND SERVANT, 11.
Slight want of ordinary care, in statute. See RAILROADS, 22.
So much water as the grantee may need for any machinery which he or his assigns may erect, in conveyance. See WATERS AND WATERCOURSES, 5.
Terms, in statute. See PUBLIC UTILITIES, 1.
Working in shops and offices, in statute. See MASTER AND SERVANT, 2.

WORKMEN'S COMPENSATION.

1. As to all employees of a railway company—not merely as to those "working in shops and offices"—the company may accept the provisions of ch. 50, Laws of 1911 (secs. 2394—1 to 2394—31, Stats.). *Minneapolis, St. P. & S. S. M. R. Co. v. Industrial Commission,* 552

2. All the employees of a railway company were covered by its acceptance in general terms of the provisions of said act, although such acceptance was followed by specifications as to number of employees and places and nature of employment which related only to employees working in shops and offices. *Ibid.*

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